No.

In the Supreme Court of the United States

RICHARD A. CULBERTSON,
PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

"Fees for [the] representation of individuals claiming Social Security old-age, survivor, or disability benefits [at] the administrative and judicial review stages [are handled] discretely: [42 U.S.C.] § 406(a) governs fees for representation in administrative proceedings; § 406(b) controls fees for representation in court." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 793-794 (2002). Section 406(b) specifies in particular that

> [w]henever a court renders a judgment favorable to a claimant * * * who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee *for such representation*, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A) (emphasis added).

The question presented is:

Whether fees subject to § 406(b)'s 25-percent cap include, as the Sixth, Ninth, and Tenth Circuits hold, only fees for representation in court or, as the Fourth, Fifth, and Eleventh Circuits hold, also fees for representation before the agency.

PARTIES TO THE PROCEEDING BELOW

In addition to Richard A. Culbertson and the then-Commissioner of Social Security, Celalettin Akarcay, Darleen R. Schuster, Bill J. Westfall, and Katrina F. Wood were parties in the consolidated proceeding in the court of appeals. Among the non-governmental parties, Richard A. Culbertson is the real party in interest. App., *infra*, 3a, n.1. Since the petition concerns fee awards related to the representation of only Bill J. Westfall and Katrina F. Wood, petitioner believes that Celalettin Akarcay and Darleen R. Schuster have no interest in the outcome of the petition. See Rule 12.6.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 861 F.3d 1197. The district court's orders of April 20, 2016, on Plaintiff's Amended Consent Motion For Attorney's Fees (App., *infra*, 18a-29a), of November 17, 2015, on Plaintiff's Unopposed Request For Authorization To Charge A Reasonable Fee Under 42 U.S.C. 406(b) (App. *infra*, 30a-35a), and of April 19, 2015, on Defendant's Motion For Relief From Order Pursuant To Rule 60 (App., *infra*, 36a-57a), are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. On September 15, 2017, Justice Thomas extended the time for filing a petition for a writ of certiorari until November 23, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent parts of the relevant statutory provisions, 42 U.S.C. § 406(a)-(b), appear in the appendix. App., *infra*, 58a-64a.

STATEMENT

A. Statutory Background

Title II of the Social Security Act, 42 U.S.C. § 401 et seq., governs the award and collection of fees by

attorneys representing claimants seeking old-age, survivor, or disability insurance benefits. Section 406(a) governs the award and collection of attorney's fees for representing Social Security claimants before the agency. Section 406(b), by contrast, governs the award and collection of fees by attorneys for representing claimants in court.

Section 406(a) provides two ways for an attorney to obtain fees for work before the agency: the "fee petition process" and the "fee agreement process." The "fee petition process" is governed by § 406(a)(1). When the agency acts favorably to the claimant, § 406(a)(1) authorizes the Administration to "fix * * * a reasonable fee to compensate [the] attorney for the services performed by him in connection with such claim." 42 U.S.C. § 406(a)(1). Section 406(a)(1) requires that any such award be "reasonable" but does not otherwise limit it. And the agency "may authorize a fee even if no benefits are payable." 20 C.F.R. § 404.1725(b)(2).

The "fee agreement process" is governed by § 406(a)(2). Under it, the attorney and the claimant enter into a written fee agreement and submit it to the agency before it determines the claimant's benefits. 42 U.S.C. § 406(a)(2)(A). If the agency acts favorably to the claimant, it "shall approve" the fee agreement at the time of the determination, provided the fee does not exceed the lesser of 25 percent of the claimant's past-due benefits or $6,000. Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080 (Feb. 4, 2009).

Section 406(b), by contrast, governs the fees an attorney may charge a claimant for representation *in court*. It states that

> [w]henever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A). The particular question concerns whether § 406(b)'s allowance of "reasonable fee[s] for *such representation*," *ibid.* (emphasis added), includes representation before the agency or only before the court.

B. Procedural Background

1. In 2008, Katrina F. Wood, represented by Richard A. Culbertson, filed for Social Security disability benefits but was determined by the Administrative Law Judge (ALJ) not to be disabled. App., infra, 28a. After the Appeals Council denied review, Wood sought review in the district court, which reversed and remanded the agency's decision. *Ibid.* The court also awarded Wood $4,107.27 in attorney's fees under the Equal Access to Justice Act (EAJA). App., *infra*, 22a. At that point, Wood and Culbertson entered into a fee agreement providing for attorney's fees for future work in the amount of 25 percent of any past-due benefits minus attorney fees paid under the EAJA. App., *infra*, 19a, 22a. On reconsideration, the agency awarded Wood past-due benefits of $35,211 for

herself and a child beneficiary, App., *infra*, 27a, and, pursuant to § 406(a), awarded Culbertson $2,865 in attorney's fees for representing her before the agency, App., *infra*, 5a, 22a, which would come out of her awarded past-due benefits, App., *infra*, 19a.

Wood then asked the district court to authorize a payment of $4,488.48 in attorney's fees to Culbertson under § 406(b) for his work reversing the agency's initial decision in court. App., *infra*, 19a. The request followed the terms of the fee agreement and represented 25 percent of the past-due benefits that Wood had collected ($8,595.75) minus the fees already awarded under the EAJA ($4,107.27). App., *infra*, 19a. Relying on Fifth Circuit precedent adopted by the Eleventh Circuit and two unpublished Eleventh Circuit decisions, see App., *infra*, 20a (following *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970) and citing *Paltan* v. *Commissioner of Social Security*, 518 F. App'x 673 (11th Cir. 2013) and *Bookman* v. *Commissioner of Social Security*, 490 F. App'x 314 (11th Cir. 2012) as persuasive authority), the district court held, however, that § 406(b) imposed a 25-percent cap on the total amount of attorney's fees that could be awarded under *both* § 406(a) and § 406(b), App., *infra*, 26a. It thus declined to award Culbertson for his work in court 25 percent of the past-due benefits minus the EAJA award, as the fee agreement provided. *Ibid.* The district court instead awarded only $1,623.48, which represented 25 percent of the past-due benefits minus *both* the EAJA award and the § 406(a) fees awarded by the Commissioner. App., *infra*, 26a.

2. Culbertson also successfully represented claimant Bill Westfall before the agency and district court. App., *infra*, 6a, 33a. After the agency denied Westfall disability benefits, the district court reversed and remanded and awarded Westfall $2,713.30 under the EAJA. App., *infra*, 6a. On remand, the agency awarded Westfall past-due benefits of $24,157. *Ibid.* Based on a contingency-fee agreement with Westfall, App., *infra*, 31a, Culbertson asked the district court for $3,325.95 in attorney's fees for representation in court under § 406(b), which represented 25 percent of past-due benefits awarded ($6,039.25) less the EAJA award ($2,713.30), App., *infra*, 6a-7a. Relying on Fifth Circuit precedent adopted by the Eleventh Circuit and two unpublished Eleventh Circuit decisions, see App., *infra*, 32a (following *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970) and citing *Paltan* v. *Commissioner of Soc. Sec.*, 518 F. App'x 673 (11th Cir. 2013) and *Bookman* v. *Commissioner of Soc. Sec.*, 490 F. App'x 314 (11th Cir. 2012) as persuasive authority), the district court held that § 406(b) imposed a 25-percent cap on the total amount of attorney's fees that could be awarded under *both* § 406(a) and § 406(b), *ibid.* Since the agency had not yet determined allowable § 406(a) fees, the district court allowed Culbertson's full § 406(b) request for $3,325.95 but barred him from requesting further fees under § 406(a) or otherwise. App., *infra*, 7a.

3. On consolidated appeal, the Eleventh Circuit affirmed the district court's orders. App., *infra*, 17a. It first rejected the claimants' argument that *Dawson*, the controlling Fifth Circuit precedent adopted by the Eleventh Circuit, see App., *infra*, 11a, limited only the

amount the agency could itself *pay out* from past-due benefits, not the amount the district court could *authorize* for payment, App., *infra*, 13a. Next it acknowledged that three other circuits "do not apply the 25% limit in § 406(b) to the aggregate fee award under § 406." *Ibid.* Although that was "[t]rue," the court argued (1) that all those cases "explicitly or implicitly recognize that Dawson[, the controlling Fifth Circuit precedent, did] limit[] the combined § 406(a) and (b) attorney's fees awards to 25% of past-due benefits," *ibid.*, (2) that "[t]he Fifth Circuit continues to read Dawson to limit the aggregate award" and (3) that "the Fourth Circuit [has] relied on Dawson to support its holding that § 406(b) limits the combined § 406 award to 25% of past-due benefits." App., *infra*, 14a, n.5 (citations omitted). "To the extent Mr. Culbertson points to other circuits to argue Dawson was wrongly decided," it noted, "this does not empower us to ignore it." App., *infra*, 14a. "We are," it continued, "bound by this circuit's prior panel precedent rule to apply Dawson's holding unless it is overruled by the Supreme Court or by this Court sitting en banc." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. There Is A Deep And Acknowledged Conflict Among The Courts Of Appeals Over Whether Section 406(b)'s 25-Percent Cap On Attorney's Fees Applies Only To Fees Awarded Under Section 406(b) Or To The Combined Total Fees Awarded Under Sections 406(a) And 406(b)

In reaching its decision below, the Eleventh Circuit noted that "some other circuits" disagreed with it and "do not apply the 25% limit in § 406(b) to the aggregate

fee award under § 406." App., *infra*, 13a. The Fifth Circuit has also recognized "sharp disagreement from other courts of appeals" over how § 406(b)'s 25-percent cap applies, *Rice* v. *Astrue*, 609 F.3d 831, 835 (5th Cir. 2010), and several other courts of appeals have acknowledged the split as well, *Booth* v. *Commissioner of Soc. Sec.*, 645 F. App'x 455, 457 (6th Cir. 2016) (acknowledging the split with a "*But see*" signal); *Murkeldove* v. *Astrue*, 635 F.3d 784, 788 n.1 (5th Cir. 2011) ("There is currently a Circuit split on the issue."); *Clark* v. *Astrue*, 529 F.3d 1211, 1215 (9th Cir. 2008) (noting that "[o]ther circuits that have addressed this issue have reached different results" and characterizing the split as one between a "plain text" approach and an approach "[b]ased primarily on legislative history").

Practice guides to Social Security law also have acknowledged the split. See Robert E. Jones et al., *Rutter Group Practice Guide: Federal Civil Trials and Evidence* § 19:335.1 (Westlaw, current through June 2017) (discussing the split); Carolyn A. Kubitschek & Jon C. Dubin, *Social Security Disability Law and Procedure in Federal Court* § 10:8 (Westlaw, current through Feb. 2017) (same); 1 Robert L. Rossi, *Attorneys' Fees* § 10:66 (3d ed. 2017) (Westlaw, current through June 2017) (same); 5 *West's Federal Administrative Practice* § 6277 (Westlaw, current through June 2017) (same). Indeed, even the Commissioner of Social Security has acknowledged the circuit split:

> This Court[, the Fifth Circuit,] has held that § 406 limits the combined amount of attorney's fees that may be awarded the attorney under § 406(a)

> and § 406(b) to a total of 25 percent of any past-due benefits awarded to the claimant. *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir.), *cert. denied*, 400 U.S. 830 (1970). *Accord Morris v. SSA*, 689 F.2d 495, 497-98 (4th Cir. 1982). But see *Clark v. Astrue*, 529 F.3d 1211, 1215 (9th Cir. 2008) ("§ 406(b)'s cap on attorney's fees applies only to fees awarded under § 406(b), and does not limit the combined fees awarded under both § 406(a) and § 406(b)"); *Wrenn v. Astrue*, 525 F.3d 931, 936 (10th Cir. 2008) (same), and *Horenstein v. Secretary of HHS*, 35 F.3d 261, 262 (6th Cir. 1994) (en banc) (same).

Gov't C.A. Br. at 5 n.2, *Jackson* v. *Astrue*, 705 F.3d 527 (5th Cir. 2013) (No. 12-10255); see also Gov't C.A. Br. at 7 & n.3, *Murkeldove* v. *Astrue*, 635 F.3d 784 (5th Cir. 2011) (Nos. 09-11093 & 09-10902) (similarly summarizing the split).

Where, as here, there is "sharp disagreement" among the circuits, *Rice*, 609 F.3d at 835, only this Court's review can bring uniformity to the law and settle this pressing and practically important issue.

A. Three Federal Circuits Hold That Section 406's Legislative History Requires The Total Fees Awarded Under Sections 406(a) And 406(b) To Be Capped At 25 Percent Of Past-Due Benefits

The Fourth, Fifth, and Eleventh Circuits have held that 42 U.S.C. § 406(b) "precludes the aggregate allowance of attorney's fees greater than 25 percent of the past due benefits received by the claimant" without regard to whether those fees were authorized

under § 406(a) for representation before the agency or under § 406(b) for representation in court. *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970); see also App., *infra*, 11a-12a (interpreting *Dawson* as holding that "the 25% limit from § 406(b) applies to total fees awarded under both § 406(a) and (b)"); *Morris* v. *Social Sec. Admin.*, 689 F.2d 495, 496 (4th Cir. 1982) (per curiam) (affirming district court's ruling that § 406 "limits the aggregate attorney's fees recoverable to 25 percent of the claimant's past-due benefits").

These courts have followed a particular reading of the statute's legislative history to reach this result. *Morris*, 689 F.2d at 497; *Dawson*, 425 F.2d at 1194-1195. They all have focused on the Department of Health, Education, and Welfare's (HEW) statements in 1965 to the Senate Finance Committee about why the 25-percent cap to § 406(b) should be added. *Morris*, 689 F.2d at 497; *Dawson*, 425 F.2d at 1194-1195. These courts place particular weight on the Department's statement that amending § 406(b) was "designed to alleviate two problems." *Dawson*, 425 F.2d at 1194 (quoting *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 512-513 (1965)). According to HEW, the amendment would first "encourage effective legal representation of claimants [by allowing] the court-approved fee to the attorney [to be paid directly by the agency] out of the amount of accrued benefits." *Ibid.* (quoting *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 512-513 (1965)). Second, the amendment's 25-percent cap would address concerns "that attorneys have on occasion charged what appeared to be inordinately large fees for representing claimants in Federal

district court actions arising under the social security program." *Ibid.* (quoting *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 512-513 (1965))

The Fourth Circuit focused further on a Senate report that used language virtually identical to HEW's second statement. *Morris*, 689 F.2d at 497 (ignoring HEW's first statement that § 406(b) was intended to "encourage effective legal representation of claimants," but using both the report and HEW's second statement to identify "inordinately large fees * * * as the impetus for the amendment") (quoting S. Rep. No. 89-404, at 122 (1965)). To these courts, this legislative history indicated a congressional intent "to insure [sic] that the old age benefits for retirees and disability benefits for the disabled, which are usually the claimant's sole means of support, are not diluted by a deduction of an attorney's fee of one-third or one-half of the benefits received." *Dawson*, 425 F.2d at 1194-1195; see also *Morris*, 689 F.2d at 497 (discussing the Senate report and concluding that "the legislative history of section 406 convinces us that the court must take into account any fees fixed by the Secretary pursuant to subsection (a)"). Based on these concerns, these courts held that "fees under § 406(a) [awarded at the administrative level] plus fees under § 406(b) [awarded at the district-court level] cannot exceed 25% [of the claimant's past-due benefits]." *Rice*, 609 F.3d at 835.

The Fourth Circuit relied further on the 1965 amendment's legislative history to interpret a later 1968 amendment to § 406(a), which it thought supported aggregating § 406(a) and § 406(b) awards

under § 406(b)'s cap. *Morris*, 689 F.2d at 497-498. The court explained that after the 1968 amendment to § 406(a), which limited attorney's fees for representation before the agency to 25 percent of past-due benefits, "neither the Secretary nor the district court was authorized to approve an attorney's fee in excess of 25 percent of the successful claimant's past-due benefits." *Id.* at 497. Since "Congress," it believed, "did not want the amount of an attorney's fees to turn on the forum in which a claim was decided," the Fourth Circuit inferred "that the same desire to eliminate 'inordinately large fees[]' * * * that prompted Congress to adopt the 1965 amendment * * * also inspire[d] the passage of the parallel 1968 amendment." *Id.* at 497-498. From this, the court concluded, the 25-percent cap had to apply to the total of § 406(a) and § 406(b) awards. Otherwise, "an attorney [could] recover fifty percent of his client's accrued benefits in direct contravention of congressional attempts to foreclose contingent fee arrangements of one-third to one-half." *Id.* at 498.

B. Three Other Federal Circuits Hold That Section 406's Plain Language, Structure, And Legislative History All Require That Section 406(b)'s 25-Percent Cap Apply Only To Fees Awarded For Work Before The Court

The Sixth, Ninth, and Tenth Circuits have interpreted § 406(b) as limiting "only the amount of attorney's fees awarded under § 406(b), not the combined fees awarded under § 406(a) and § 406(b), to 25% of the claimant's past-due benefits." *Clark* v. *Astrue*, 529 F.3d 1211, 1218 (9th Cir. 2008); see also

Wrenn v. *Astrue*, 525 F.3d 931, 937 (10th Cir. 2008) ("Based on the plain language and statutory structure found in § 406, the 25% limitation on fees for court representation found in § 406(b) is not itself limited by the amount of fees awarded by the Commissioner"); *Horenstein* v. *Secretary of Health & Human Servs.*, 35 F.3d 261, 262 (6th Cir. 1994) (en banc) (overruling prior circuit precedent and holding that § 406(b)'s 25-percent cap applies only "[f]or services performed in a federal court where the court awards benefits").

The primary rationale embraced by these courts, as expressed by Judge Bea writing for the Ninth Circuit in *Clark* v. *Astrue*, is that "the plain text of § 406(b) limits only the award of attorney's fees for representation of a Social Security claimant before the district court." 529 F.3d at 1215; see also *Wrenn*, 525 F.3d at 937 ("[b]as[ing holding] on the plain language and statutory structure found in § 406"); *Horenstein*, 35 F.3d at 262 (overruling precedent that had imposed a "blanket 25 percent cap on fee awards" because that holding "f[ound] little support in the language of the statute").

That "plain text" instructs that

> [w]henever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A). These courts have reasoned that "[t]he statute authorizes the court to award a reasonable fee 'for such representation'" and that "such representation" can refer only to "representation 'before the court,'" *Clark*, 529 F.3d at 1215 (quoting § 406(b)), the only type of representation referenced by § 406(b) itself.

Some of these courts have also held that § 406's structure points to the same conclusion. The Tenth Circuit, for example, has noted that "[s]ection 406 'deals with the administrative and judicial review stages discretely: § 406(a) governs fees for representation in administrative proceedings; § 406(b) controls fees for representation in court.'" *Wrenn*, 525 F.3d at 932 (quoting *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 794 (2002)); see also *Clark*, 529 F.3d at 1214 (describing § 406(a) as "govern[ing] the award and collection of attorney's fees for the representation of Social Security claimants in proceedings before the Administration" and § 406(b) as "govern[ing] the award and collection of fees by attorneys for the representation of claimants in court"). The Ninth Circuit has likewise pointed out that § 406(a)(1) gives the agency the power to award attorney's fees that are "reasonable" at the administrative level—without imposing a 25-percent limit—in the event that there is no contingency agreement between a claimant and an attorney who represented the claimant during the administrative proceedings. *Id.* at 1216 (quoting 42 U.S.C. § 406(a)(1)). "If a fee award under § 406(a) can be greater than 25% of past-due benefits," the court explained, "it follows that the combined amount of fees

awarded under both § 406(a) and § 406(b) must be capable of exceeding 25% of past-due benefits." *Ibid.*

Finally, the Ninth Circuit "f[ou]nd unconvincing the legislative history upon which the Fourth and Fifth Circuits relied in holding § 406(b) limits the combined total of attorney's fees awarded under both § 406(a) and § 406(b) to 25% of past-due benefits." *Clark*, 529 F.3d at 1216. The Ninth Circuit noted that the testimony referenced by the Fifth Circuit demonstrated a concern only about "inordinately large fees for representation 'of claimants *in Federal district court actions*.'" *Id.* at 1216-1217 (quoting *Dawson*, 425 F.2d at 1194). "Nowhere," it explained, "did Congress (or even a congressional committee) express a desire to limit the aggregate fees awarded both for representation of a claimant in court *and* for representation of the claimant before the Administration." *Ibid.* Next, the Ninth Circuit pointed out that the Fourth Circuit in *Morris* had incorrectly interpreted the 1968 amendment to § 406(a) that it had further relied on. *Id.* at 1217. That amendment, the Ninth Circuit noted, "did not prohibit the [agency] from authorizing attorney's fees under § 406(a) in excess of 25 percent of past-due benefits." *Ibid.* To the contrary, the amendment allowed the agency to authorize any "reasonable" fee and "left untouched the [agency's] authority to award attorney's fees under § 406(a)(1) in excess of 25% of past-due benefits." *Id.* at 1218. This fact persuaded the court that "[t]he correct interpretation of the 1968 amendment [not only] does not support the Fourth Circuit's holding in Morris[,] it instead supports the holding we make today." *Ibid.* "[I]f a fee award under § 406(a) can be

greater than 25% of past-due benefits," the court repeated, "it follows that the combined amount of fees awarded under both § 406(a) and § 406(b) must be capable of exceeding 25% of past-due benefits." *Ibid.*

* * *

As matters now stand, attorney's fees awards under § 406 are adjudicated under materially different standards in different circuits. This disuniformity affects attorneys' willingness to represent claimants and ultimately the claimants' ability to receive past benefits due them.

II. The Fourth, Fifth, And Eleventh Circuits Misinterpret The Statute's Plain Language, Structure, Purpose, And History

A. The Plain Language Of Section 406(b) Makes Clear That A Court Should Not Consider Fees Awarded Under Section 406(a) As Subject To Section 406(b)'s 25-Percent Cap

This Court has long held that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain * * * the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

The language of 42 U.S.C. § 406(b) is plain. In relevant part, the statute provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its

> judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

Section 406(b)'s fee authorization "for such representation" refers to representation "before the court"—the only type of representation mentioned to which the term "such representation" could refer. In no way can it include fees for representation before the agency. Reading in a limitation of 25 percent for the total of fees awarded under subsections (a) and (b) therefore violates the "cardinal canon" of construction that a court is to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

Unlike subsection (b), subsection (a) of section 406 does refer to fees provided for representation "before the Commissioner for benefits." 42 U.S.C. § 406(a)(1). Reading an aggregate limitation into § 406(b) therefore also runs counter to the principle of *expressio unius est exclusio alterius*, the notion that "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015). Because Congress used the "particular language" of "before the court" in regard to fees awarded under subsection (b) and did not include the "particular language" of "before the Commissioner," it intended for § 406(b)'s cap to extend no further than to awards under § 406(b) itself.

When the words of a statute are unambiguous, as they are in § 406(b), the "judicial inquiry is complete."

Connecticut Nat'l Bank, 503 U.S. at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). The Court thus need not consult either the statutory structure, the congressional purpose, or the legislative history, but, in fact, all three point in the same direction as the plain language.

B. Section 406's Structure Creates Distinct Avenues For Obtaining Fees For Administrative And Judicial Representation

The statutory structure confirms what the plain language makes clear—Congress created two distinct and independent award mechanisms in subsections (a) and (b). Section 406(a) itself provides two ways for an attorney to seek fees for representing a claimant in administrative proceedings: the fee-petition process and the fee-agreement process. Under the former, the agency authorizes a "reasonable fee" to be paid to the claimant's representative.[1] 42 U.S.C. § 406(a)(1). Under the latter, any fee set by agreement between the attorney and the claimant controls so long as it does not exceed the lesser of 25 percent of the claimant's past-due benefits or $6,000. Maximum Dollar Limit in

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[1] The agency has given this reasonableness inquiry real teeth. In determining whether a fee request is reasonable, it must consider "[t]he extent and type of services the representative performed;" "[t]he complexity of the case;" "[t]he level of skill and competence required of the representative[;]" the time the representative spent on the matter; the success of the representation; and the amount of the fee petition. 20 C.F.R. § 404.1725(b). The agency also allows both the claimant and the attorney to seek administrative review of fees authorized under the petition process. *Id.* § 404.1720(d).

the Fee Agreement Process, 74 Fed. Reg. 6080 (Feb. 4, 2009).

Section 406(b), on the other hand, governs awards for attorneys representing claimants before a district court. 42 U.S.C. § 406(b). Given that section 406(a) sets forth two separate avenues for determining attorney's fees for representation before the agency, it would not make sense to interpret section 406(b) to regulate awards for representation there. There is simply no need for section 406(b) to regulate awards already deemed "reasonable" under section 406(a) either by the agency itself or because they fall within the safe harbor set by Congress. Section 406(a)'s two attorney's fee provisions effectively check excessive fees for representation before the agency. Checking them again under a provision designed to check fees for representation in court represents an insidious form of double-counting.

As the Ninth Circuit has pointed out, moreover, the petition process does not cap the reasonable fees the agency can award through the petition process. *Clark*, 529 F.3d at 1218. Because § 406(a)(1) authorizes the agency to award reasonable fees above 25 percent of past-due benefits, it makes no sense for § 406(b) to include such fees under its own 25-percent cap. In many cases, that would mean that fees authorized as "reasonable" under § 406(a)(1) would be effectively unreasonable under § 406(b).

Section 406(b), on the other hand, is addressed to different proceedings—those before a district court. In enacting § 406(b), Congress was similarly concerned about excessive fee requests and so it placed a separate check on attorney's fees earned there that is analogous

to § 406(a)(2)'s 25-percent safe harbor. Congress structured the statute to separate fee determinations by forum for a reason: claimants may use different representatives before the agency and district court. Even a non-lawyer, for example, can represent—and receive fees for representing—a claimant before the agency. See Office of the Inspector General, Soc. Sec. Admin., *Informational Report: Agency Payments to Claimant Representatives*, No. A-05-15-15017, at 1 (2015), *available at* https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-15-15017.pdf (last visited Nov. 10, 2017) ("A claimant may appoint a qualified individual to act on his/her behalf in matters before the Social Security Administration."). Only attorneys, by contrast, can represent claimants in court and be awarded fees for doing so. Soc. Sec. Admin., *Program Operations Manual System* GN 03920.017 § D.5, n.2, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920017#d (last visited Nov. 10, 2017) ("In court cases, the law does not provide for direct payment to a non-attorney."). The Social Security Administration recognizes that representation may change between agency and court proceedings. See *id.* GN 03920.060 § A.5, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920060 ("The attorney(s) for the court proceedings may differ from the representative(s) for the SSA administrative proceedings.").

C. Applying A Cap Of 25 Percent Under Section 406(b) For Work Done Before Both The Agency And The District Court Undermines Congress's Purpose

Though the Court need not consider Congress's purpose when a statute's terms, like § 406(b)'s, are unambiguous, *Connecticut Nat'l Bank*, 503 U.S. at 254, Congress's purpose in enacting § 406(b) further supports what the plain text makes clear: the fee awarded to an attorney under § 406(b) is independent of any fee awarded under § 406(a).

Congress added subsection (b) to § 406 to "encourage effective legal representation of claimants." *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 512-513 (1965). Interpreting its 25-percent cap as an aggregate limit on awards issued under both § 406(a) and § 406(b) undermines this purpose.

Subsection 406(b) contemplates a contingency-fee agreement subject to a fixed maximum fee. Contingency fees often "provide the only practical means by which one * * * can economically afford * * * the services of a competent lawyer." Model Code of Prof'l Responsibility EC 2-20 (Am. Bar Ass'n 1980). This is particularly true of the "needy individuals" who qualify for Social Security benefits. 42 U.S.C. § 306(a). Interpreting § 406(b)'s cap to include fees awarded under § 406(a) would disincentivize attorneys from representing claimants and remove the only "practical means" by which needy claimants can attain representation.

Consider the following not uncommon case. One attorney represents a claimant before the agency and

the agency denies past-due benefits. Both the claimant and the attorney receive nothing. Another attorney specializing in work before the district courts agrees to seek judicial review of the adverse decision and is successful. Only that attorney's success makes it possible for the claimant and the earlier attorney to receive anything. If the earlier attorney is successful on agency remand, he will be entitled to any agreed-upon contingency fees subject to § 406(a)'s cap. As this Court has recognized, however, "virtually every attorney representing Title II disability claimants includes in his/her retainer agreement a provision calling for a fee equal to 25% of the past-due benefits." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 803 (2002) (internal quotation marks and citation omitted). The attorney who represented the claimant before the agency will thus be entitled under § 406(a) to fees of 25 percent of the claimant's overall award. If § 406(b)'s cap includes these fees, then the attorney who represented the claimant in court can receive no fees—even when it was this attorney's work before the court that made the § 406(a) award to the earlier attorney possible.

The possibility of the earlier attorney receiving all the fees available will strongly discourage other attorneys from helping claimants seek judicial review. It will also have a perverse knock-on effect. Realizing that no other attorney would likely agree to seek judicial review of an unfavorable initial agency decision, the earlier attorney will be less likely to represent a claimant in the initial agency proceedings. And even if the earlier attorney were willing to seek judicial review herself, she would understand that the

many more hours she would have to spend on that effort would entitle her to no more fees. Such prospects would discourage attorneys from taking on social security cases generally. In a world where contingency fees for general civil litigation typically "rang[e] from 33% to 50%" and "seldom amount to less than 33%" of the recovery, Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 Wash. & Lee L. Rev. 1339, 1347, 1351 (1996), the possibility of receiving fees of less than 25 percent, let alone no fees at all, would strongly discourage attorneys from representing Social Security beneficiaries, see *id.* at 1347 (discussing significant rates that lawyers typically receive under contingency fee agreements).

Ultimately, of course, claimaints themselves would suffer as they found it more and more difficult to find lawyers willing to represent them. This presents serious concerns for beneficiaries. Empirical studies show that legal representation for claimants is critical to their success. Based on recent data, federal courts review over 12,000 social security disability appeals per year. U.S. Gov't Accountability Off., GAO-07-331, *Disability Programs: SSA Has Taken Steps to Address Conflicting Court Decisions, but Needs to Manage Data Better on the Increasing Number of Court Remands* 3 (2007). Of those appeals, district courts remand half back to the agency for further review. *Ibid.* And in the remanded cases, 66 percent of the claimants are awarded benefits. *Ibid.* Discouraging attorneys from representing claimants, then, could potentially

withhold benefits from up to 4,000 deserving claimants per year.

Any concerns of attorneys abusing § 406 to reap "inordinately large fees," *e.g.*, *Dawson*, 425 F.2d at 1194 (internal quotation marks omitted), are misplaced, moreover. According to the most recent data, about 91 percent of claimant representatives in agency proceedings, which includes attorneys, make less than $100,000 in annual income. Off. of the Inspector Gen., SSA, *Informational Report: Agency Payments to Claimant Representatives*, No. A-05-15-15017, at 4 (2015). Attorneys who represent claimants in Social Security proceedings do not do so to get rich. They accept a relatively modest income to assist our society's most needy individuals.

D. Those Courts Holding That Section 406(b)'s 25-Percent Cap Applies To Fees Awarded For Both Administrative And In-Court Representation Misinterpret The Legislative History

Those courts aggregating agency and court fee awards under § 406(b) have relied almost exclusively on legislative history to reach this result. That is mistaken. Not only is such reliance suspect, *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) ("What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators."), but the text of § 406 is so clear that a court "need not consider [any] extra-textual evidence," *ibid.* Properly considered, however, the legislative history actually supports those courts on the other side of the split.

These courts base their analysis of the legislative history on two documents: Hearings before the Senate Committee on Finance and a Senate Report. *Morris* v. *Social Sec. Admin*, 689 F.2d 495, 497 (4th Cir. 1982) (discussing the Senate Report); *Dawson* v. *Finch*, 425 F.2d 1192, 1194-1195 nn.2-3 (5th Cir. 1970) (discussing both documents); App., *infra*, 11a (adopting the Fifth Circuit's legislative history analysis in *Dawson*). While these courts are correct that Congress was motivated, in part, by a desire to curb "inordinately large fees," *Hearings on H.R. 6675 Before the Senate Comm. on Fin.*, 89th Cong. 513 (1965) (supplemental report submitted by the Dep't of Health, Educ., and Welfare) (HEW), these documents show that such concern was limited to fees in district court proceedings. As HEW explained in its report to the Senate Finance Committee:

> [A]ttorneys have on occasion charged what appeared to be inordinately large fees for representing claimants in *Federal district court actions* arising under the social security program. Usually, these inordinately large fees result from a contingent fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half of the accrued benefits). Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, may be payable if the claimant wins his case.

Ibid. (emphasis added). The official Senate Report adopted this explanation nearly verbatim. S. Rep. No. 89-404, at 122 (1965). There was no concern expressed about fees awarded for representation before the

agency. That makes sense. Those fees often go to a different person and are already subject to reasonableness review by the agency or a separate 25-percent cap. See pp. 17-19, *supra* (describing statutory scheme). They could not lead to "inordinately large fees" going to the in-court lawyer.

III. This Recurring Issue Is Of National Importance

Section 406 affects the proper administration of several large national programs administered by the Social Security Administration (SSA), including the Old-Age, Survivors, and Disability Insurance program (OASDI) and the Supplemental Security Income program (SSI). Kimberley Dayton et al., *Advising the Elderly Client* § 18:50 (2017); Soc. Sec. Admin., *Understanding Supplemental Security Income (SSI) Overview—2017 Edition*, https://www.ssa.gov/ssi/text-over-ussi.htm; see also *Moriarty* v. *Colvin*, 806 F.3d 664, 667 (1st Cir. 2015) (describing how § 406 governs attorney's fees awarded in SSI cases). In 2015, 60 million Americans received OASDI benefits worth $886 billion. Soc. Sec. Admin., *Annual Statistical Supplement to the Social Security Bulletin, 2016*, at 1 (2017). In the same year, 8.3 million Americans received SSI benefits worth $55 billion. Soc. Sec. Admin., *Annual Statistical Supplement to the Social Securit Bulletin, 2016*, (2017). Combined, Social Security payments composed 23.9 percent of overall federal spending in 2015. Office of Mgmt. & Budget, *Historical Tables*, Table 8.3 (2017), https://www.whitehouse.gov/omb/budget/Historicals.

Beneficiaries of these programs are among the most vulnerable of Americans. In 2016, for example,

86 percent of SSI beneficiaries received payments because of blindness or disability. Soc. Sec. Admin., *Fast Facts & Figures About Social Security, 2017*, https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2017/fast_facts17.html#contributions. Among these disabled beneficiaries, "[t]he majority (87 percent) were disabled workers, 10.4 percent were disabled adult children, and 2.5 percent were disabled widow(er)s." Soc. Sec. Admin., *Annual Statistical Report on the Social Security Disability Insurance Program, 2015*, at 11 (2016), https://www.ssa.gov/policy/docs/statcomps/di_asr/2015/di_asr15.pdf. Among beneficiaries over the age of sixty-five—a demographic that comprises 26 percent of SSI beneficiaries—62 percent receive half of their income from Social Security. Soc. Sec. Admin., *Fast Facts & Figures About Social Security, 2017*, https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2017/fast_facts17.html#contributions; Soc. Sec. Admin., *SSI Annual Statistics Report, 2015*, at ii (Jan. 2017); see also Joyce Nicholas & Michael Wiseman, *Elderly Poverty and Supplemental Security Income*, 69 Soc. Sec. Bulletin 45 (2009), https://www.ssa.gov/policy/docs/ssb/v69n1/v69n1p45.html ("Elderly SSI recipients are very poor. Nearly 70 percent fall in the bottom fifth of the national income distribution, and about the same proportion fall in the bottom fifth of the income distribution among all elderly persons. Although correction for SSI underreporting reduces the official poverty rate for elderly SSI recipients, the revised absolute rate is still 38–40 percent when all SSI (and OASDI) benefits are included as income."). Among families receiving Social Security child benefits, many are impoverished because "although not targeted

toward low-income families, [these benefits] provide income maintenance for many such families, in part because the conditions that give rise to child benefit eligibility—death, disability, and retirement—often lead to family income loss." Christopher R. Tamborini et al., *A Profile of Social Security Child Beneficiaries and Their Families: Sociodemographic and Economic Characteristics*, 71 Soc. Sec. Bulletin 11 (2011), https://www.ssa.gov/policy/docs/ssb/v71n1/v71n1p1.html. For these beneficiaries, receiving favorable determinations from the SSA is a virtual necessity.

The vast number of people who depend on social security benefits explains the abundance of claims at the agency and district court level. Disability beneficiaries in 2013 filed "approximately 3 million initial and 784,000 reconsideration claims." Off. of the Inspector Gen., Soc. Sec. Admin., *Fiscal Year 2013 Inspector General Statement on the Social Security Administration's Major Management and Performance Challenges* 117 (Dec. 2013), https://www.ssa.gov/finance/2013/OIG%202013%20AFR%20Mgmt%20Challenges.pdf. SSA had over 698,000 initial disability claims pending in September 2013. *Ibid.* During the year ending June 30, 2017, 18,953 social security cases were filed in district courts, making social security cases 6.98 percent of all civil cases filed in district court. *United States District Courts—National Judicial Caseload Profile*, http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2017.pdf.

Attorneys who represent the claimants in these cases do not do so to get rich. Of people who represent claimants before the agency, for example, which

includes attorneys, 91 percent made less than $100,000 in annual income in tax year (TY) 2013. Off. of the Inspector Gen., Soc. Sec. Admin., *Informational Report: Agency Payments to Claimant Representatives*, A-05-15-15017, at 4 (July 2015), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-15-15017.pdf. Their median annual income related to SSA direct payments, moreover, was only $7,800 in TY 2013. *Ibid.*

It is also worth noting that attorney's fees awarded under § 406(b) may not exceed 25 percent of a claimant's "*past-due* benefits." 42 U.S.C. § 406(b)(1)(A) (emphasis added). As the term implies, past-due benefits include only the "amount of * * * monthly benefits credited * * * that have accumulated because of a favorable administrative determination or decision, *up to but not including the month SSA effectuates the primary beneficiary's decision.*" Soc. Sec. Admin., Program Operations Manual System, *Representative's Fee—Title II Past-Due Benefits* GN 03920.030 (emphasis added).

In addition to past-due benefits, a claimant deemed "disabled" receives monthly benefits "as long as [her] medical condition has not improved and [she] can't work." Soc. Sec. Admin., *What You Need to Know When You Get Social Security Disability Benefits*, at 1 (2017) [hereinafter *What You Need to Know*], *available at* https://www.ssa.gov/pubs/EN-05-10153.pdf. Also, a disabled claimant's family may qualify for benefits because of the claimant's disability. Soc. Sec. Admin., *Disability Benefits, January 2017*, at 10, *available at* https://www.ssa.gov/pubs/EN-05-10153.pdf. And finally, of critical importance, after two years of

receiving disability payments, a claimant automatically receives Medicare coverage. *What You Need to Know* 7. Old-age beneficiaries also receive benefits going forward that § 406(b) excludes from contingency-fee awards. 42 U.S.C. § 406(b).

Given the possibility that a disabled beneficiary will receive such wide-ranging forward-looking benefits, an attorney's fee of—at most—a quarter of the beneficiary's *past-due* benefits can be appreciated for what it is: a reasonable fee in return for critical work, unlikely to constitute the "inordinately large fee" that Congress feared. *Hearings on H.R. 6675 Before the Senate Comm. on Fin.*, 89th Cong. 513 (1965). As the Ninth Circuit has noted, § 406(b) "limits attorneys' fees to a percentage of past-due benefits and allows no recovery from future benefits, which *may far exceed* the past-due benefits awarded." *Crawford* v. *Astrue*, 586 F.3d 1142, 1150 (2009) (emphasis added).

Having attorney representation greatly increases the likelihood of claimants being able to successfully recover past-due benefits to which they are entitled. Testimony of an expert before a House committee explains why that is the case:

> SSA's statistics for FY 2000 indicate that 74.9% of Title II disability claimants are represented by an attorney. Statistics for the same period indicate that the allowance rate at the hearing level for Title II disability claimants with representation is 63.6%; in contrast, the allowance rate for unrepresented Title II claimants is 40.1%. We would suggest that this difference is attributable to a number of reasons. The knowledgeable representative knows the sequential evaluation system

> set forth in the regulations and Social Security Rulings and knows the applicable standards. The representative can marshal evidence from treating medical sources, school systems, vocational testing, previous employers, etc. The knowledgeable representative can thoroughly cross-examine vocational and medical witnesses whom the ALJ has called. These are daunting tasks for pro se claimants, especially when we consider that they are in poor health and often have only limited education. Indeed, the statute requires SSA, whenever an adverse determination is sent to a claimant, to provide information on options for obtaining a private attorney as well as from legal services organizations providing free legal assistance.

Social Security's Processing of Attorney Fees: Hearing Before the Subcomm. on Soc. Sec. of the House Comm. on Ways & Means, 107th Cong. 50 (2001) (statement of Nancy G. Shor, Exec. Dir. of the Nat'l Org. of Soc. Sec. Claimants' Representatives). The hurdles a claimant seeking to recover past-due benefits faces are daunting, and social security attorneys are often necessary to vindicate claimants' rights. Section 406(b) determines whether vulnerable claimants can secure attorneys to represent them in court. Such representation is vital for them to be able to navigate our vast and complex social security program.

IV. This Case Provides An Ideal Vehicle For Resolving The Conflict

This petition presents a single issue of how to interpret an important provision of federal law. It involves no issues of fact or questions of state law. The split is clear and the issue is cleanly presented.

The issue presented is also outcome-determinative. Little would remain to be done. The district court has already determined what amounts would be due under the proper reading of § 406(b). In Ms. Wood's case, it would grant that amount. In Mr. Westfall's, it would allow him to request fees under § 406(a) from the agency.

The issue has also sufficiently percolated in the lower courts. Six courts of appeal have decided it and they are evenly split. Each case involved in the split presents similar facts and the opinions on each side largely rely on the same reasoning. The arguments in the courts of appeals have been exhausted. The issue is ripe for this Court's review and only this Court's review can bring uniformity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Appendix

[PUBLISH]

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

No. 16-13664

D.C. Docket No. 6:12-cv-00915-DAB

KATRINA F. WOOD,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

No. 16-13665

D.C. Docket No. 6:12-cv-01882-KRS

CELALETTIN AKARCAY,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

No. 16-13666

D.C. Docket No. 6:14-cv-00784-DAB

BILL J. WESTFALL,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant–Appellee.

No. 16-14004

D.C. Docket No. 6:13-cv-01336-KRS

DARLEEN R. SCHUSTER,

Plaintiff-Appellant,

RICHARD ALLEN CULBERTSON,

Petitioner-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(June 26, 2017)

Before MARTIN, JILL PRYOR, and ANDERSON, Circuit Judges.

MARTIN, Circuit Judge:

Richard Culbertson was counsel to the four plaintiffs shown in the caption here, who asked for and were awarded Social Security disability benefits. This appeal consolidates the four cases, and it is about attorney's fees for Mr. Culbertson. To his credit, Mr. Culbertson represented Katrina Wood, Celalettin Akarcay, Bill Westfall, and Darleen Schuster (together, the "claimants") in their successful challenge to the Commissioner of Social Security's decision to deny them disability benefits. After winning for these clients, Mr. Culbertson asked the District Court to award him attorney's fees in all four cases.[1]

Two statutes govern fees paid to lawyers representing Social Security claimants. First, 42 U.S.C. § 406 allows the Commissioner to set a fee for representation of the claimant at the administrative

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[1] Mr. Culbertson is the real party in interest in this appeal. See Gisbrecht v. Barnhart, 535 U.S. 789, 798 n.6, 122 S. Ct. 1817, 1823 n.6 (2002). Because Mr. Culbertson's attorney's fees will come out of the award that would otherwise go to his clients, the Commissioner now "plays a part in the fee determination resembling that of a trustee for the claimants." Id. To be clear about the parties' roles here, if Mr. Culbertson wins, his clients will get less money. If the Commissioner wins, they will get more. See id. at 804 n.13, 122 S. Ct. at 1826 n.13 (noting attorneys are "paid directly with funds withheld from their clients' benefits awards"); 42 U.S.C. § 406(a)(4).

level, id. § 406(a), and the District Court to set a fee for representation of the claimant in court, id. § 406(b). Second, a claimant can request fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). In this appeal, Mr. Culbertson argues that the District Court did not correctly calculate the fees he is entitled to under these statutes and Eleventh Circuit precedent. After careful consideration, and with the benefit of oral argument, we affirm the decisions of the District Court.[2]

I.

Mr. Culbertson represented all four of the captioned plaintiffs in appealing the Commissioner's denial of disability benefits to them. He was successful in all four appeals. We will set out a narrative about each of the cases, which is summarized in a chart in section I.E.

A. MS. WOOD

The District Court reversed the Commissioner's denial of benefits to Ms. Wood, then remanded her case to the Commissioner. The court later awarded Ms. Wood $4,107.27 in attorney's fees under the EAJA. On remand, the Commissioner awarded Ms. Wood past-due benefits of $30,871 and awarded her child $4,340 as an auxiliary beneficiary. As is customary, the Commissioner withheld 25% of the total award ($8,595.75) to pay attorney's fees. The Commissioner

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[2] The parties consented to jurisdiction by a U.S. Magistrate Judge in each case. We refer to the Magistrate Judges' orders as those of the District Court.

also awarded Mr. Culbertson $2,865 under § 406(a) for representing Ms. Wood at the administrative level.

Mr. Culbertson asked the District Court for attorney's fees of $4,488.48 under § 406(b) for representing Ms. Wood in court. He calculated this figure by subtracting the EAJA award from the 25% of the past-due benefits the Commissioner withheld. The court granted Mr. Culbertson's request in part, but limited his award to $1,623.48. The court declined to pay the full amount requested by Mr. Culbertson because it found he failed to subtract the earlier § 406(a) award in calculating his fees.

B. MR. AKARCAY

As with Ms. Wood's case, the District Court reversed the Commissioner's denial of benefits to Mr. Akarcay and remanded the case back to the Commissioner. The District Court later awarded Mr. Akarcay $3,121.70 in attorney's fees under the EAJA. On remand, the Commissioner awarded Mr. Akarcay past-due benefits of $69,047, withholding the usual 25% ($17,261.75) for attorney's fees.

Mr. Culbertson asked the District Court for permission to charge Mr. Akarcay $14,140.05 in attorney's fees under § 406(b), which was the amount withheld minus the EAJA award. The court denied Mr. Culbertson's request. The District Court reasoned that it could not determine the proper § 406(b) fee award without first knowing the attorney's fee award the Commissioner would grant under § 406(a). The District Court directed Mr. Culbertson to file a renewed motion after the Commissioner determined the § 406(a) fee award.

C. MS. SCHUSTER

As with the others, the District Court reversed the Commissioner's denial of disability benefits to Ms. Schuster. The court remanded the case back to the Commissioner and later awarded Ms. Schuster $4,988.17 in EAJA attorney's fees. On remand, the Commissioner awarded Ms. Schuster past-due benefits of $54,382, withholding 25% of the award ($13,595.50) for attorney's fees.

Mr. Culbertson sought $10,707.08[3] in attorney's fees under § 406(b). The District Court denied Mr. Culbertson's request, again reasoning that it could not decide the proper § 406(b) fee award until the Commissioner awarded attorney's fees under § 406(a). The District Court noted Mr. Culbertson could file a renewed motion after the § 406(a) fees were set.

D. MR. WESTFALL

Again in Mr. Westfall's case, the District Court reversed the Commissioner's denial of disability benefits to him. The court remanded the case to the Commissioner, and awarded Mr. Westfall $2,713.30 in EAJA attorney's fees. On remand, the Commissioner awarded Mr. Westfall past-due benefits of $24,157, withholding 25% ($6,039.25) for attorney's fees.

Mr. Culbertson asked for attorney's fees of $3,325.95 under § 406(b), which was the amount

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[3] Mr. Culbertson says he calculated this figure by subtracting the EAJA award from the 25% withheld from Ms. Schuster's past-due benefits. The District Court was correct in pointing out that there is an error in this calculation, which would have accurately been a request for $8,607.33.

withheld minus the EAJA award. In this case, as in some of the others, the Commissioner had not yet awarded § 406(a) fees. However, in contrast to the other cases, for Mr. Westfall's case, the District Court granted Mr. Culbertson's fee request "provided that counsel is barred from any further request for fees in this matter, pursuant to § 406(a) or otherwise, and counsel for both parties are directed to advise the agency of this preclusion as part of the Court's award." In other words, the District Court awarded Mr. Culbertson his 25% (in combined EAJA and § 406(b) fees), but told him he could not ask for more.

In the Westfall case, the Commissioner filed a Federal Rule of Civil Procedure 60 motion, asking the District Court to correct a legal error. The Commissioner argued the court erred to the extent it "direct[ed] the Commissioner not to award counsel § 406(a) fees," which is a decision "entrusted by statute exclusively to the Commissioner." The District Court denied the motion, saying its order barred counsel from requesting more fees and "did not purport to direct the Commissioner to take—or not take—any action."

E. SUMMARY

This chart summarizes the past-due benefits awarded and withheld; the attorney's fees awarded and requested; and the relevant District Court order in each claimant's case.

Petitioner	Ms. Wood	Mr. Alarcon	Ms. Schuster	Mr. Westhill
Past-Due Benefits Awarded	$35,211	$69,047	$54,382	$24,157
Past-Due Benefits Withheld (25%)	$8,595.75	$17,261.75	[illegible]30	$6,039.25
Amount Mr. Culbertson Received	$8,595.75	$3,121.70 plus future awards	$4,988.17 plus future awards	$6,039.25
EAJA Award	$4,107.27	$3,121.70	$4,988.17	$2,7137.30
§ 406(a) Award	$2,865	Pending	Pending	N/A
§ 406(b) Request (% of Past-Due Benefits)	$4,488.48 (12.7%)	$14,140.05 (20.5%)	$10,707.08 (19.7%)	$3,325.95 (13.8%)
District Court Decision on Mr. Culbertson's § 406(b) Request	Awarded $1,623.48 ($4,488.48 minus $2,865.00)	Denied request and ordered to refile after § 406(a) award is set	Denied request and ordered to refile after § 406(a) award is set	Awarded $3,325.95, but barred from seeking further fees under § 406(a)

II.

We review a district court's decision on attorney's fees for an abuse of discretion. See Watford v. Heckler, 765 F.2d 1562, 1569 n.11 (11th Cir. 1985). The district court's interpretation of a statute, we review de novo. Bergen v. Commissioner of Soc. Sec., 454 F.3d 1273, 1275 (11th Cir. 2006) (per curiam).

A.

As we've set out above, there are three statutory provisions allowing fees for lawyers representing people claiming Social Security disability benefits. Section 406(a) allows attorney's fees for representation of claimants at the administrative level. 42 U.S.C. § 406(a)(1). Section 406(a) requires the Commissioner to set a reasonable attorney's fee when it decides in favor of a claimant represented by an attorney. Id. A fee awarded under § 406(a) is paid out of the claimant's past-due benefits. Id. § 406(a)(4). Section 406(a)(1) does not itself limit the amount of fees the Commissioner can award.

Section 406(b) allows "a court entering judgment in favor of a Social Security benefits claimant" to set a reasonable attorney's fee for representing the claimant in court. Jackson v. Commissioner of Soc. Sec., 601 F.3d 1268, 1271 (11th Cir. 2010); see 42 U.S.C. § 406(b)(1)(A). A fee awarded under § 406(b) is also paid out of the claimant's past-due benefits. 42 U.S.C. § 406(b)(1)(A). This fee award can be no more than 25% of the total past-due benefits. Id.

The third statutory source of attorney's fees is the EAJA. "[S]uccessful Social Security benefits claimants may request a fee award under the EAJA" from the courts. Jackson, 601 F.3d at 1271. A court "shall" award this fee "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C § 2412(d)(1)(A). EAJA fees are paid by the government, and are not taken from the claimant's past-due benefits. See Jackson, 601 F.3d at 1271. Neither are EAJA fee awards limited. See Watford,

765 F.2d at 1566–67. Instead, EAJA fees are set by multiplying the hours spent on a case times a fixed hourly rate. See Gisbrecht, 535 U.S. at 796, 122 S. Ct. at 1822.

For our purposes here, we note that the EAJA includes a "Savings Provision" that requires an attorney who is awarded fees under both the EAJA and § 406(b) to refund the smaller of the two awards to the claimant. 28 U.S.C. § 2412 note, Act of Aug. 5, 1985, Pub. L. No. 99–80, § 3, 99 Stat. 183, 186. "[T]he Savings Provision was intended to prevent attorneys from receiving double recovery under both the EAJA and § 406(b)." Jackson, 601 F.3d at 1272. "Thus, an EAJA award offsets an award under Section 406(b), so that the amount of the total past-due benefits the claimant actually receives will be increased by the EAJA award . . . ." Gisbrecht, 535 U.S. at 796, 122 S. Ct. at 1822 (quotation omitted and alterations adopted). The Savings Provision makes clear that the government pays the EAJA award so that the claimant spends less of his past-due benefits on an attorney. In other words, EAJA does not exist so much to enrich the claimant's attorney as it does to protect the claimant.

B.

All parties point to Eleventh Circuit cases interpreting these fee-award statutes. Mr. Culbertson says Jackson explains the method by which he calculated his fee requests under § 406(b). 601 F.3d 1268. In Jackson, this Court considered whether the EAJA required an attorney to affirmatively refund the smaller of the EAJA and § 406(b) fees, or whether the attorney could get the same fee amount by reducing his § 406(b) fee request by the amount of the EAJA

award he'd received. Id. at 1269. Jackson concluded that attorneys were allowed to do the latter, because it "effectuate[s] the refund" required by the EAJA Savings Provision. Id. at 1274. Under either administrative approach, the attorney collects the same amount and the claimant receives the same amount. See id. at 1273 ("Regardless of whether the attorney writes a refund check to his client or deducts the amount of the EAJA award from his § 406(b) fee request, the purpose of the Savings Provision is fulfilled—the attorney does not get a double recovery.").

Our precedent also includes Dawson v. Finch, 425 F.2d 1192 (5th Cir. 1970),[4] which guided the District Court's consideration of the relationship between a fee award set by the Commissioner under § 406(a) and a fee award set by the courts under § 406(b). In Dawson, an attorney requested a fee under § 406(b) equal to 25% of his client's past-due benefits, even though the Commissioner already awarded him 25% of the past-due benefits under § 406(a). Id. at 1193. The Dawson panel ruled that the language and legislative history of § 406(b) "clearly indicate[d]" that the 25% cap on fees paid out of past-due benefits was designed "to insure that the old age benefits for retirees and disability benefits for the disabled . . . are not diluted by a deduction of an attorney's fee of one-third or one-half of the benefits received." Id. at 1195. Thus, the

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[4] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

panel opined that the 25% limit from § 406(b) applies to total fees awarded under both § 406(a) and (b), "preclud[ing] the aggregate allowance of attorney's fees greater than 25 percent of the past due benefits received by the claimant." Id. (emphasis added).

In deciding Mr. Culbertson's fee requests under § 406(b) in each of the four cases, the District Court relied on Dawson. In Ms. Wood's case, the court looked to Dawson's holding that the combined § 406(a) and (b) fees cannot be more than 25% of past-due benefits, and reduced Mr. Culbertson's fee request by the § 406(a) award he had received so as to limit his fee award to 25% of Ms. Wood's past-due benefits. In the other three cases, the Commissioner had not yet made an award under § 406(a). The District Court therefore relied on Dawson's holding when it declined to set § 406(b) fees for Mr. Akarcay's and Ms. Schuster's cases until the Commissioner determined § 406(a) fees. In Mr. Westfall's case, the District Court acknowledged Dawson's holding, but instead of waiting for the Commissioner to determine § 406(a) fees, granted Mr. Culbertson's § 406(b) fee request and at the same time barred him from requesting § 406(a) fees.

III.

Mr. Culbertson says the District Court erred in three ways: (1) by imposing a 25% cap on § 406 fees; (2) by including the EAJA awards in establishing the cap; and (3) by exceeding its authority in directing the Commissioner.

A.

Mr. Culbertson first says the District Court did not properly apply Dawson in capping his total fee awards at 25% of past-due benefits. He says Dawson distinguished between the amount that can be paid out from a claimant's past-due benefits and the fee awards the Commissioner and district court can "authorize." He argues that because the attorney in Dawson had already been paid 25% of the claimant's past-due benefits, the Dawson holding meant the attorney could not be paid more from those funds. Yet, he argues that Dawson did not limit the amount of fees that can be authorized under § 406. Unfortunately for Mr. Culbertson, this distinction is refuted by the words of the Dawson opinion itself. It said "[w]e are fully convinced that 42 U.S.C.[] [§] 406 precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant. Dawson has already been authorized by the Secretary to charge the maximum. He is entitled to no more." 425 F.2d at 1195 (emphases added).

Mr. Culbertson points out that some other circuits do not apply the 25% limit in § 406(b) to the aggregate fee award under § 406. See Clark v. Astrue, 529 F.3d 1211, 1218 (9th Cir. 2008); Wrenn ex rel. Wrenn v. Astrue, 525 F.3d 931, 937–38 (10th Cir. 2008); Horenstein v. Sec'y of Health & Human Servs., 35 F.3d 261, 262 (6th Cir. 1994) (en banc). True, but at the same time all the cases he points to either explicitly or implicitly recognize that Dawson limited the combined § 406(a) and (b) attorney's fee awards to 25% of past-due benefits. See Clark, 529 F.3d at 1217 (disagreeing

with Dawson's holding); Wrenn, 525 F.3d at 937 (noting Dawson's holding); Horenstein, 35 F.3d at 262 (overruling Webb v. Richardson, 472 F.2d 529, 536 (6th Cir. 1972), which relied on Dawson's holding).[5]

To the extent Mr. Culbertson points to other circuits to argue Dawson was wrongly decided, this does not empower us to ignore it. We are bound by this circuit's prior panel precedent rule to apply Dawson's holding unless it is overruled by the Supreme Court or by this Court sitting en banc. See United States v. Steele, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc). We conclude that the District Court did not err in its interpretation and application of Dawson.

B.

Mr. Culbertson next argues that since EAJA fees are not paid out of a claimant's past-due benefits, the District Court should not have included the EAJA fee awards when calculating whether his requests were within the 25% cap. He says that he has only asked for § 406(b) fees equal to "12.7%, 13.8%, [19.7%], and 20.5% of the total past due benefits awarded." But this argument is refuted by our precedent in Jackson, where this Court held an attorney could deduct the EAJA award from her § 406(b) request because this method "effectuate[s] the refund." 601 F.3d at 1274.

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[5] The Fifth Circuit continues to read Dawson to limit the aggregate award. See Murkeldove v. Astrue, 635 F.3d 784, 788 & n.1 (5th Cir. 2011); Rice v. Astrue, 609 F.3d 831, 835 & n.12 (5th Cir. 2010). And the Fourth Circuit relied on Dawson to support its holding that § 406(b) limits the combined § 406 fee award to 25% of past-due benefits. See Morris v. Social Sec. Admin., 689 F.2d 495, 497–98 (4th Cir. 1982).

Mr. Culbertson's request in Ms. Wood's case demonstrates how his fee requests deplete the claimants' past-due benefits without replenishing them with an EAJA refund, thereby running afoul of Jackson. In Ms. Wood's case, Mr. Culbertson asked for a total attorney's fee award of $11,460.75.[6] If he were awarded that amount, $1,242.27 of the funds withheld by the Commissioner for attorney's fees would be returned to Ms. Wood.[7] If, to the contrary, Mr. Culbertson had refunded Ms. Wood's EAJA award at the time he got the §406(b) award, he would have given her $4,107.27, and he likely would have kept all of the $8,595.75 withheld by the Commissioner from Ms. Wood's past-due benefits. Thus, Mr. Culbertson's proposal would result in Ms. Wood receiving only $1,242.27, while a refund of the EAJA award would have given her $4,107.27

This makes clear that Mr. Culbertson's request for fees does not comply with Jackson's requirement that he "effectuate the refund" when taking fees under both § 406(b) and the EAJA. Jackson anticipated that the claimant would get the same amount of money under either method. Mr. Culbertson's argument that the District Court should not have included the EAJA award within the 25% cap is therefore mistaken.

Although not what Mr. Culbertson proposed, our precedent would have allowed him to receive the EAJA

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[6] This amount is equal to the total of $4,107.27 in EAJA fees; $2,865 in § 406(a) fees; and the $4,488.48 requested under § 406(b).

[7] $8,595.75 withheld by the Commissioner minus $2,865 in § 406(a) fees and minus Mr. Culbertson's request of $4488.48 in § 406(b) fees would leave $1,242.27 for Ms. Wood.

fees in lieu of a larger § 406(b) award because Ms. Wood would then have a greater share of the remaining withheld past-due benefits. See Jackson 601 F.3d at 1273 ("By deducting the amount of the EAJA award from his § 406(b) fee request, [the attorney] reduced the amount that [the claimant] would otherwise be required to pay in § 406(b) fees, thereby increasing the portion of past-due benefits payable directly to [the claimant].") What Mr. Culbertson did propose was to have the District Court use his requested § 406(b) award in calculating the 25% cap. This would have allowed Mr. Culbertson to keep the EAJA award and also deplete the withheld past-due benefits. To preserve Ms. Wood's refund, it is therefore necessary for the District Court to add Mr. Culbertson's requested § 406(b) fee together with his EAJA award to arrive at the "true § 406(b) award" for the purposes of the 25% cap. This method of calculation complies with our precedent, as well as Congress's intent in enacting the Savings Provision. See id. at 1272–73; see also Gisbrecht, 535 U.S. at 796, 122 S. Ct. at 1822 (noting the Savings Provision works to increase "the amount of the total past-due benefits the claimant actually receives" (quotation omitted and alteration adopted)).

C.

Finally, Mr. Culbertson argues the District Court exceeded its authority in its directions to the Commissioner. The Commissioner agrees that the District Court exceeded its power in directing the Commissioner in Mr. Westfall's case, to the extent the District Court imposed requirements on the

Commissioner. Yet, the Commissioner says the District Court's orders were otherwise correct.

We do not read the District Court order in Mr. Westfall's case in the way that the parties read it. It seems clear to us that, as explained in its Rule 60 order, the District Court order granting § 406(b) fees imposed no requirements on the Commissioner. The court simply barred Mr. Culbertson from seeking more fees, and in doing so, acted within its powers. See Farese v. Scherer, 342 F.3d 1223, 1232 n.11 (11th Cir. 2003) (per curiam) ("We have long held that powers incidental to the federal court include the authority to control and discipline attorneys appearing before it." (quotation omitted)). The court also acted within its authority in Mr. Akarcay's and Ms. Schuster's cases in denying Mr. Culbertson's § 406(b) requests, saying that he could refile them after the Commissioner makes the § 406(a) fee determinations. See id. We see no abuse of discretion by the District Court in its fashioning of these methods to comply with our precedent. See Watford, 765 F.2d at 1569 n.11. We therefore affirm the District Court in each case.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KATRINA F. WOOD,

Plaintiff,

Case No. 6:12-cv-915-Orl-DAB

-vs-

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER

This cause came on for consideration with oral argument on the following motion filed herein:

MOTION:	**AMENDED CONSENT MOTION FOR ATTORNEY'S FEES (Doc. 40)**
FILED:	**December 17, 2015**

THEREON it is **ORDERED** that the motion is **GRANTED in part**.

Introduction

Counsel's motion for authorization to charge a reasonable fee follows the issuance of an Order and Judgment reversing the decision of the Commissioner of Social Security with respect to Plaintiff's claim for benefits, and remanding the case pursuant to sentence four of 42 U.S.C. § 405(g) (Docs. 21 & 22). As set forth in the motion, Plaintiff's attorney, Richard Culbertson, petitions this Court pursuant to 42 U.S.C. §406(b) for authorization to charge his client a fee for federal court representation in the amount of $4,488.48. This fee is based on a contingency fee agreement between counsel and Plaintiff (Doc. 26-1), and the Commissioner's letter notifications that Plaintiff and her auxiliary beneficiaries were awarded past due benefits. Doc. 26-2, 26-3. The Commissioner filed a Response objecting to Plaintiff's calculation of the fee, which did not include a deduction for the § 406(a) fees previously awarded to Plaintiff's counsel. Upon review, the motion is **GRANTED in part**.

Analysis

I. The statutory framework

There are three statutory provisions under which attorneys representing claimants in Social Security Disability cases may be compensated: 42 U.S.C. §§ 406(a) and 406(b), and 28 U.S.C. § 2142(d). Section 406(a) provides the exclusive avenue for attorneys seeking fees for work done before the Commissioner at the administrative level. The fees awarded under §406(a) are paid out of the claimant's past-due benefits awarded. 42 U.S.C. § 406(a)(2)(A) and (B). Section 406(a) caps the fees that may be awarded at twenty-

five percent of past-due benefits awarded or a lesser fixed amount. 42 U.S.C. § 406(a)(2)(A)(ii)(I)-(II).

For fees incurred representing claimants in federal court, claimants and their attorneys may seek fees under two statutory provisions, 42 U.S.C. § 406(b) and the Equal Access to Justice Act, 28 U.S.C. § 2142(d) ("the EAJA"). Under Section 406(b), upon entry of judgment in favor of a claimant, the Court may award a reasonable fee for work performed before the Court, which is paid out of the claimant's past-due benefits awarded. 42 U.S.C. § 406(b)(1)(A). Section 406(b) imposes a cap on the total amount of fees that may be awarded. 42 U.S.C. § 406(b)(1)(A). Section 406(b) provides that a Court may not award fees "in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled." 42 U.S.C. § 406(b)(1)(A).

The Fifth Circuit has held that 42 U.S.C. § 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant." *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970). Thus, in this circuit,[1] the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits. *See Paltan v. Commissioner of Soc. Sec.*, 518 F. App'x. 673 (11th Cir. 2013); *Bookman v. Commissioner of Soc. Sec.*, 490 F. App'x 314 (11th Cir. 2012).[2]

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[1]In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent the law of the former Fifth Circuit.

[2]In the Eleventh Circuit, unpublished decisions are not binding, but are persuasive authority. *See* 11th Cir. R. 36-2.

In contrast, the EAJA permits a *claimant* to seek an award of fees against *the government* for work that is done before the Court if the claimant prevailed and the position of the Commissioner is not substantially justified. 28 U.S.C. § 2412(d)(1)(A). The EAJA contains a Savings Provision, however, that provides that "where the claimant's attorney receives fees for the same work under both [406(b) and the EAJA], the claimant's attorney refunds *to the claimant* the amount of the smaller fee." 28 U.S.C. 2412 note, Act of Aug. 5, 1985, Pub.L. No. 99-80, § 3, 99 Stat. 183, 186 (unmodified) (emphasis added).[3] *See Jackson v. Commissioner of Soc. Sec.*, 601 F.3d 1268, 1271 (11th Cir. 2010) (noting that the attorney may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) request).

As discussed at great length in *Westfall v. Comm. of Social Security*, Case No. 6:14-cv-784-DAB (M.D. Fla. April 19, 2016) (Doc. 33), in this circuit, the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits, and double payment under the EAJA is not allowed. *See Paltan v. Comm'r of Soc. Sec.*, 518 F. App'x. 673, 674 (11th Cir. 2013); *Bookman v. Comm'r of Soc. Sec.*, 490 F. App'x 314 (11th Cir. 2012).

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[3]Note that the refund is not to the government, but to the claimant. This is consistent with Supreme Court precedent noting that the fee is awarded to the prevailing party, not the party's attorney. *See Astrue v. Ratliff*, 560 U.S.586, 130 S. Ct. 2521, 177 L.Ed. 2d 91 (2010).

II. Calculation of fees in this case

In this case, counsel seeks a §406(b) award of $4,488.48, calculated by deducting *only* the $4,107.27 EAJA award counsel has already received, from the $8,595.75 withheld by the Commissioner (25% of past due benefits), and omitting any deduction for the § 406(a) fee previously awarded. *See* Doc. 26. As noted by the Commissioner, Plaintiff's counsel erroneously fails to deduct the § 406(a) fee award of $2,865, which would result in a net fee award of $1,623.48. Doc. 27.

Directly on point is the Eleventh Circuit's per curiam opinion in *Paltan v. Commissioner of Social Security*, 518 F. App'x. 673, 674 (11th Cir. 2013), affirming the decision of this Court which deducted the § 406(a) fee previously awarded:

> George Paltan appeals the district court's [] award of attorney's fees under 42 U.S.C. § 406(b) to Richard Culbertson, his attorney before the district court in a challenge to the Social Security Administration's denial of his application for disability insurance benefits and supplemental security income. On appeal, Paltan argues the district court erred by awarding Culbertson attorney's fees in the amount of $182.91, rather than $4,281.83. **He maintains the district court erroneously concluded that the total amount of attorney's fees recoverable under 42 U.S.C.§ 406(a), § 406(b), and the Equal Access to Justice Act (EAJA), 28 U.S.C.§ 2412(d), could not exceed 25% of Paltan's past-due benefits.**

The district court did not err in its attorney's fees calculation.[] Paltan was represented in his proceedings before the Social Security Administration by J. Michael Matthews. After the Commissioner of Social Security denied Paltan's application for benefits, Paltan, represented by Culbertson, successfully appealed to the district court. Following the district court's remand, the Social Security Administration awarded Paltan $38,327.35 in past-due benefits. Accordingly, Matthews and Culbertson could receive, in the aggregate, 25% of those past-due benefits as attorney's fees, or $9,581.83. *See Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir.1970) (holding that 42 U.S.C.§ 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant.").[] Because Matthews received $5,300.00 in attorney's fees pursuant to 42 U.S.C.§ 406(a) for his work before the Social Security Administration, Culbertson was entitled only to $4,281.83 under § 406(b) for his work before the district court–i.e., the remainder of the $9,581.83 of past-due benefits available for attorney's fees. *See Dawson*, 425 F.2d at 1195.

Culbertson, however, previously obtained an attorney's fees award of $4,098.92 under the EAJA for the work he did before the district court. As such, the "Savings Provision" of the EAJA required Culbertson to refund either the EAJA award or the § 406(b) award, whichever was smaller. 28 U.S.C. § 2412, note; Pub. L. No.

99-80, § 3, 99 Stat. 186 (1985); *see also Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1271-72 (11th Cir. 2010). Because the $4,098.92 EAJA award was smaller than the § 406(b) award of $4,281.83, Culbertson was required to refund the EAJA award to Paltan. Culbertson had the option of either refunding the EAJA award to Paltan directly, or reducing his § 406(b) award by $4,098.92, leaving him with a § 406(b) award of $182.91, the figure calculated by the district court.[] *See Jackson*, 601 F.3d at 1274 (explaining that an attorney who receives fees under both the EAJA and § 406(b) "may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) fee request").

In performing this calculus, the district court did not create a new rule limiting attorney's fees awards under § 406(a), § 406(b), and the EAJA to 25% of a claimant's past-due benefits. Instead, the district court followed binding Circuit precedent in imposing a 25% cap on attorney's fees under § 406(a) and (b) in the aggregate. The court, moreover, did not err by refusing to allow Culbertson to offset his EAJA award by deducting it from the total of Paltan's past-due benefits, which included the § 406(a) award to Matthews, or by prohibiting Culbertson from receiving double payment under the EAJA and § 406(b) for representing Paltan before the district court. *See id.* at 1272 ("We have previously recognized that the Savings Provision was intended to prevent attorneys

> from receiving double recovery under both the EAJA and § 406(b)."). Accordingly, we affirm the district court's award of attorney's fees.

Paltan, 518 F. App'x 673, 673-75 (11th Cir. 2013) (emphasis added and footnotes omitted). *See Bookman v. Comm'r of Soc. Sec.*, 490 F. App'x 314, 316 (11th Cir. 2012) (affirming the district court as not authorized to award additional attorney's fees under § 406(b) where the SSA had already awarded 25% of the claimant's past-due benefits to her attorney under § 406(a), and any additional award under § 406(b) would have resulted in an aggregate award that exceeded the maximum allowable under § 406).

Under the dictates of the Eleventh Circuit's holding in *Jackson v. Commissioner of Social Security*, 601 F.3d 1268, 1271 (11th Cir. 2010), the claimant is entitled to the full benefit of the EAJA award unless the EAJA award exceeds the §406(b) fee. In cases where the funds withheld by the Commissioner are sufficient to cover the §406(b) fee, counsel has the option of refunding the EAJA award to the claimant or reducing the §406(b) fee by the same amount. *Id.* In cases where the withheld funds are insufficient to pay the entire approved §406(b) fee, counsel may collect only so much of the withheld funds as leaves the claimant with the full EAJA award – again, unless the EAJA award exceeds the available §406(b) funds. Thus, regardless of whether it is offset by refund directly to the claimant, or retained by counsel and deducted from the §406(b) request, the EAJA award cannot be ignored and must be accounted for in the

§406(b) calculation.[4] The Court will continue to utilize the methodology approved by the Eleventh Circuit in *Paltan*. Accordingly, the appropriate calculation for the §406(b) award is to subtract the $4,107.27 EAJA award counsel has already received from the $8,595.75 withheld by the Commissioner (25% of past due benefits), which results in $4,488.48, minus the § 406(a) of $2,865 previously awarded, which would result in a net fee award of **$1,623.48**.

III. Reasonableness of resulting fee award

To evaluate an attorney's § 406(b) petition, the Court must determine whether the fee requested is reasonable. *Gisbrecht v. Barnhart*, 535 U.S. 739, 122 S.Ct. 1817 (2002). According to their Fee Agreement, Plaintiff retained Mr. Culbertson on June 6, 2012, for representation in federal court. Doc. 26-1. The "best indicator of the 'reasonableness' of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client, not an hourly rate determined under lodestar calculations." *Whalen v. Commissioner of Social Security*, Case No. 6:10cv865-Orl-22DAB, 2012 WL 2798486, *2 (M.D. Fla. 2012) (citing *Wells v. Sullivan*, 907 F.2d 367, 371 (2d Cir.1990)). However, "[a] fee pursuant to a contingency contract is not *per se* reasonable." *McGuire v. Sullivan*, 873 F.2d 974, 979 (7th Cir. 1989). The contingency fee negotiated by the claimant and her counsel is not reasonable if the agreement calls for fees greater than the twenty-five percent (25%) statutory limit, the agreement involved

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[4]This is not to say that the Court must order the refund or oversee payment. Jackson makes clear that it is counsel's obligation under penalty of law to effectuate the offset.

fraud or "overreaching" in its making, the resolution of the case was unreasonably delayed by the acts of the claimant's attorney, or would provide a fee "so large as to be windfall to the attorney." *Wells*, 907 F.2d at 372; *McGuire*, 873 F.2d at 981; *Rodriguez v. Bowen*, 865 F.2d 739, 746 (6th Cir.1989). "Because section 406(b) requires an affirmative judicial finding that the fee allowed is 'reasonable,' the attorney bears the burden of persuasion that the statutory requirement has been satisfied." *Gisbrecht*, 122 S.Ct. at 1828 n. 17.

Upon review of the supporting papers filed by Plaintiff's counsel, the Court finds that the net fee award of $1,623.48 is reasonable, and an award is appropriate under § 406(b). Counsel previously filed a fee motion stating that two experienced attorneys spent 22.3 hours of attorney time on the federal appeal in this case. Doc. 23. Due to counsel's efforts, Plaintiff was awarded approximately $35,211.00 ($30,871.00 + $4,340.00 in auxiliary beneficiary benefits) in wrongfully denied past-due benefits[5] to date, as well as ongoing benefits and medical coverage. Mr. Culbertson is an appellate attorney who has specialized in Social Security law for more than 30 years; his associate Sarah Fay is also experienced in Social Security law. Plaintiff's case was complex and she had an extensive medical history, having been treated for diabetes, peripheral neuropathy, high

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[5]The Commissioner points out an error in Plaintiff's calculation of the total amount of benefits to the auxiliary beneficiaries, however, Plaintiff's calculation of the amount withheld for attorney's fees ($8,595.75) is correct. See Doc. 27 at 2.

blood pressure, depression, and restless leg syndrome. Doc. 21 at 1.

Plaintiff originally filed for benefits on April 21, 2008, alleging an onset of disability on November 19, 2007. Doc. 28. The ALJ found Plaintiff not disabled, the Appeals Council denied review and Mr. Culbertson filed the appeal on Plaintiff's behalf in this Court on June 18, 2012. Doc. 1. The Court found that the ALJ failed to failed to [sic] adequately address Plaintiff's multiple sclerosis diagnosis and diabetic neuropathy. Doc. 21.

On September 16, 2013, the Court reversed and remanded the ALJ's decision. Doc. 21, 22. *Id.* On remand, Plaintiff was subsequently awarded benefits in February 2016. Doc. 26. Thus, almost eight years after first applying for benefits, Plaintiff received the past due benefits award in 2016. Doc. 40.

Through counsel's efforts, the decision of the ALJ was reversed and remanded based on sentence four of 42 U.S.C. §405(g), before the ALJ issued a favorable decision finding Plaintiff disabled from February 2012 and awarding of benefits. Plaintiff has received an award totaling approximately $35,000 in past-due benefits. Doc. 26. The fee award is not a windfall and is consistent with that agreed to by Plaintiff and the net amount awarded by the Court is uncontested by the Commissioner. Moreover, it is far less than § 406(b)(1) fees approved pursuant to contingent fee arrangements in other Social Security cases in this District. *See, e.g., Gorgoglione v. Commissioner*, No. 8:13-CV-953-T-33TBS, 2015 WL 2094909 (M.D.Fla. May 5, 2015) ($25,325.72); *Bibber*, 2015 WL 476190 at *6 ($24,386); *Taggart v. Commissioner*, No. 6:12–cv–

1068–Orl–TBS, 2014 WL 5320556, at *1 (M.D.Fla. Oct.17, 2014) ($24,580.25); *Hatchett v. Commissioner*, No. 6:11–cv–1810–Orl–18TBS, 2014 WL 293464, at *2 (M.D.Fla. Jan. 27, 2014) ($23,180); *White v. Commissioner*, No. 6:09–cv–1208–Orl–28GJK, 2012 WL 1900562, at *6 (M.D.Fla. May 2, 2012) ($36,680.78); *McKee v. Commissioner*, No. 6:07-cv-1554-Orl-28KRS, 2008 WL 4456453, at *7 (M.D.Fla. Sept. 30, 2008) ($20,768.00, less EAJA fees). The Court finds that the sum sought is reasonable and an award of **$1,623.48** is appropriate under § 406(b).

DONE and **ORDERED** in Orlando, Florida on April 20, 2016.

/s/

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BILL WESTFALL,
Plaintiff,

-vs- **Case No. 6:14-cv-784-Orl-DAB**

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION:	**UNOPPOSED REQUEST FOR AUTHORIZATION TO CHARGE A REASONABLE FEE UNDER 42 U.S.C 406(B) (Doc. No. 25)**
FILED:	**November 9, 2015**

THEREON it is **ORDERED** that the motion is **GRANTED,** with a caveat, as set forth herein.

Counsel's motion for authorization to charge a reasonable fee follows the issuance of an Order and Judgment reversing the decision of the Commissioner

of Social Security with respect to Plaintiff's claim for benefits, and remanding the case pursuant to sentence four of 42 U.S.C. § 405(g) (Docs. 20 & 21). As set forth in the motion, Plaintiff's attorney, Richard A. Culbertson, petitions this Court pursuant to 42 U.S.C. §406(b) for authorization to charge his client a fee for federal court representation in the amount of $3,325.95. This fee is based on a contingency fee agreement between counsel and Plaintiff and counsel's calculations regarding past due benefits received by Plaintiff. Upon review, the motion is **granted, as follows.**

Standards of Law

There are three statutory provisions under which attorneys representing claimants in Social Security Disability cases may be compensated: 42 U.S.C. §§ 406(a) and 406(b), and 28 U.S.C. § 2142(d). Section 406(a) provides the exclusive avenue for attorneys seeking fees for work done before the Commissioner at the administrative level. The fees awarded under Section 406(a) are paid out of the claimant's past-due benefits awarded. 42 U.S.C. § 406(a)(2)(A) and (B). Section 406(a) caps the fees that may be awarded at twenty-five percent of past-due benefits awarded or a lesser fixed amount. 42 U.S.C. § 406(a)(2)(A)(ii)(I)-(II).

For fees incurred representing claimants in federal court, claimants and their attorneys may seek fees under two statutory provisions, 42 U.S.C. § 406(b) and 28 U.S.C. § 2142(d) ("the EAJA"). Under Section 406(b), upon entry of judgment in favor of a claimant, the Court may award a reasonable fee for work performed before the Court, which are paid out of the claimant's past-due benefits awarded. 42 U.S.C.

§ 406(b)(1)(A). Section 406(b) imposes a cap on the total amount of fees that may be awarded. 42 U.S.C. § 406(b)(1)(A). Section 406(b) provides that a Court may not award fees "in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled." 42 U.S.C. § 406(b)(1)(A).

The Fifth Circuit has held that 42 U.S.C. § 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant." *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970). Thus, in this circuit,[1] the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits. *See Paltan v. Commissioner of Social Security*, 518 Fed. Appx. 673 (11th Cir. 2013); *Bookman v. Commissioner of Social Security*, 490 Fed. Appx. 314 (11th Cir. 2012).

By contrast, the EAJA permits a *claimant* to seek an award of fees against *the government* for work that is done before the Court if the claimant prevailed and the position of the Commissioner is not substantially justified. 28 U.S.C. § 2412(d)(1)(A). The EAJA contains a Savings Provision, however, that provides that "where the claimant's attorney receives fees for the same work under both [406(b) and the EAJA], the claimant's attorney refunds to the claimant the amount of the smaller fee." 28 U.S.C. 2412 note, Act of Aug. 5, 1985, Pub.L. No. 99-80, § 3, 99 Stat. 183, 186 (uncodified). *See Jackson v. Commissioner of Social Security*, 601 F.3d 1268, 1271 (11th Cir. 2010) (noting

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[1]In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent the law of the former Fifth Circuit.

that the attorney may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) request).

As the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits and "double dipping" under the EAJA is not allowed, the Court generally needs to know the amount awarded under § 406(a) (if any), amounts paid under EAJA (if any), and the total amount of past due benefits calculated by the agency, in order to evaluate a § 406(b) motion.

Analysis

Applied here, this Court previously entered judgment in Plaintiff's favor, with remand for further administrative proceedings. Counsel requested and received an award under the EAJA in the amount of $2,713.30 (Doc. 23). On remand, the agency found Plaintiff to be disabled and Petitioner was notified that the Plaintiff was awarded past-due benefits. The Social Security Administration advised that it was withholding a total of $6,039.25 representing 25% of the past-due benefits of the Plaintiff (Doc. 25-2). In his motion, counsel seeks a net fee of $3,325.95 (25% of the past-due benefits minus the EAJA fees awarded). No allowance is made for any potential §406(a) award. The Court observes that the fee requested here plus the retention of the EAJA payment equals the full 25% cap, leaving no additional funds available to award to this (or any other) counsel under Section 406(a), as a matter of law. *See Dawson, Paltan, Bookman, supra.*

Plaintiff's counsel states that: "No fees have been paid at the administrative level (Appendix 2), and Petitioner does not intend to file a fee petition under

42 U.S.C. § 406(a) for work done at the administrative level." (Doc. 25, pg. 2). Petitioner was Plaintiff's counsel in the administrative proceedings and the administrative record includes his acceptance of appointment and contract for legal services before the agency (Doc. 13, R. 120-22). Notably, the Appointment does not include an executed waiver of any 406(a)fee. *Id.* The Court accepts counsel's current statement as a waiver of any right to seek a 406(a) fee. Even though Mr. Culbertson was counsel at the administrative level, an award of $3,325.95 under Section 406(b) and retention of the EAJA fee constitutes all compensation available to him in this matter, from all sources.

Petitioner contends that the amount of the fee requested is reasonable under §406(b) and *Gisbrecht v. Barnhart*, 535 U.S. 789, 122 S.Ct. 1817, 70 U.S.L.W. 4477 (2002). As the undersigned noted in *Whalen v. Commissioner of Social Security*, the "best indicator of the 'reasonableness' of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client, not an hourly rate determined under lodestar calculations." Case No. 6:10-cv-865-Orl-22DAB, 2012 WL 2798486, *2 (M.D. Fla. 2012) (citing *Wells v. Sullivan*, 907 F.2d 367, 371 (2d Cir.1990)). However, "[a] fee pursuant to a contingency contract is not *per se* reasonable." *McGuire v. Sullivan*, 873 F.2d 974, 979 (7th Cir.1989). The contingency fee negotiated by the claimant and his counsel is not reasonable if the agreement calls for fees greater than the twenty-five percent (25%) statutory limit, the agreement involved fraud or "overreaching" in its making, the resolution of the case was unreasonably delayed by the acts of the claimant's attorney, or would provide a fee "so large as to be

windfall to the attorney." *Wells*, 907 F.2d at 372; *McGuire*, 873 F.2d at 981; *Rodriguez v. Bowen*, 865 F.2d 739, 746 (6th Cir.1989). "[B]ecause section 406(b) requires an affirmative judicial finding that the fee allowed is 'reasonable,' the attorney bears the burden of persuasion that the statutory requirement has been satisfied." *Gisbrecht*, 122 S.Ct. at 1828 n. 17. To the extent the fee agreement is interpreted to allow for a *total* award at or below the cap the Court finds the request here to be reasonable under the principles of *Gisbrecht*.[2]

The Motion for authorization to charge a reasonable fee for federal court representation under § 406(b) is therefore **GRANTED** to the extent counsel is authorized to charge his client $3,325.95, consistent with the fee agreement, **provided that counsel** is barred from any further request for fees in this matter, pursuant to § 406(a) or otherwise, and counsel for both parties are directed to advise the agency of this preclusion as part of the Court's award.

DONE and **ORDERED** in Orlando, Florida on November 17, 2015.

/s/
DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

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[2]According to the papers, counsel spent at least 28.2 hours in federal court effort (Doc. 27). As such, the total fee is not a windfall and is consistent with that agreed to by Plaintiff and uncontested by the Commissioner.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BILL WESTFALL,

Plaintiff,

-vs- **Case No. 6:14-cv-784-Orl-DAB**

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER

This cause came on for consideration with oral argument on the following motion filed herein:

MOTION:	**DEFENDANT'S MOTION FOR RELIEF FROM ORDER PURSUANT TO RULE 60 (Doc. No. 27)**
FILED:	**November 24, 2015**

THEREON it is **ORDERED** that the motion is **DENIED**.

The Court held argument in this and related cases, on the issue of awarding §406(b) fees (Doc. 29). Leave was granted to file supplemental papers in the relevant cases, and the parties have filed a Joint Response (Doc. 31) and a Joint Analysis (Doc. 32). In the instant motion, the Commissioner moves for "relief, in part" from the Court's November 17, 2015 Order ("the Order") granting Plaintiff's counsel's unopposed motion to charge his client a reasonable fee (Doc. 26). The basis cited for the motion is the authority of the Court to correct "mistakes" in its orders or judgments. Rule 60(a),(b)(1), Fed. R. Civ. P. (2015). Upon close review, and for the reasons set forth herein, the Court sees no such mistake and the motion is **denied.**

Analysis

I. The statutory framework

There are three statutory provisions under which attorneys representing claimants in Social Security Disability cases may be compensated: 42 U.S.C. §§ 406(a) and 406(b), and 28 U.S.C. § 2142(d). Section 406(a) provides the exclusive avenue for attorneys seeking fees for work done before the Commissioner at the administrative level. The fees awarded under §406(a) are paid out of the claimant's past-due benefits awarded. 42 U.S.C. § 406(a)(2)(A) and (B). Section 406(a) caps the fees that may be awarded at twenty-five percent of past-due benefits awarded or a lesser fixed amount. 42 U.S.C. § 406(a)(2)(A)(ii)(I)-(II).

For fees incurred representing claimants in federal court, claimants and their attorneys may seek fees under two statutory provisions, 42 U.S.C. § 406(b) and the Equal Access to Justice Act, 28 U.S.C. § 2142(d)

("the EAJA"). Under Section 406(b), upon entry of judgment in favor of a claimant, the Court may award a reasonable fee for work performed before the Court, which is paid out of the claimant's past-due benefits awarded. 42 U.S.C. § 406(b)(1)(A). Section 406(b) imposes a cap on the total amount of fees that may be awarded. 42 U.S.C. § 406(b)(1)(A). Section 406(b) provides that a Court may not award fees "in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled." 42 U.S.C. § 406(b)(1)(A).

The Fifth Circuit has held that 42 U.S.C. § 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant." *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970). Thus, in this circuit,[1] the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits. *See Paltan v. Comm'r of Soc. Sec.*, 518 F. App'x. 673 (11th Cir. 2013); *Bookman v. Comm'r of Soc. Sec.*, 490 F. App'x 314 (11th Cir. 2012).[2]

By contrast, the EAJA permits a *claimant* to seek an award of fees against *the government* for work that is done before the Court if the claimant prevailed and the position of the Commissioner is not substantially justified. 28 U.S.C. § 2412(d)(1)(A). The EAJA contains a Savings Provision, however, that provides that

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[1]In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent the law of the former Fifth Circuit

[2]In the Eleventh Circuit, unpublished decisions are not binding, but are persuasive authority. *See* 11th Cir. R. 36-2.

"where the claimant's attorney receives fees for the same work under both [406(b) and the EAJA], the claimant's attorney refunds *to the claimant* the amount of the smaller fee." 28 U.S.C. 2412 note, Act of Aug. 5, 1985, Pub.L. No. 99-80, § 3, 99 Stat. 183, 186 (unmodified) (emphasis added).[3] *See Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1271 (11th Cir. 2010) (noting that the attorney may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) request).

As the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits and double payment under the EAJA is not allowed, the Court has previously determined that it needs to know the amount awarded under § 406(a) (if any), amounts paid under EAJA (if any), and the total amount of past due benefits calculated by the agency, in order to evaluate a §406(b) motion.

II. The need for complete information

Here, counsel sought a §406(b) award of $3,325.95, (25% of the past-due benefits minus the EAJA fees awarded). Mr. Culbertson represented that: "No fees have been paid at the administrative level (Appendix 2), and Petitioner does not intend to file a fee petition under 42 U.S.C. § 406(a) for work done at the administrative level." (Doc. 25, pg. 2). As the motion

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[3]Note that the refund is not to the government, but to the claimant. This is consistent with Supreme Court precedent noting that the fee is awarded to the prevailing party, not the party's attorney. *See Astrue v. Ratliff*, 560 U.S.586, 130 S. Ct. 2521, 177 L.Ed. 2d 91 (2010).

had merit, but the amount sought plus retention of the EAJA fees equaled the 25% cap, the Court granted the motion, but barred counsel from any further request for fees in this matter, pursuant to §406(a) or otherwise (Doc. 26). The Commissioner's motion followed.

Following the filing of this motion, Mr. Culbertson advised the Court "that he is entitled to an attorney fee under 42 U.S.C. § 406(a) for a significant amount of work done at the administrative level" and he does not waive his right to file a fee petition under 42 U.S.C. § 406(a) (Doc. 28). This is problematic. As aggregate attorney's fees cannot exceed the 25% cap, the Court cannot assure itself, without knowing the status of any §406(a) claim(s), that granting the full §406(b) award sought will not run afoul of *Dawson*.

III. The Court's proposed solution and the parties' response

In cases where, as here, counsel has been unable or unwilling to disclose the §406(a) amounts awarded by the Commissioner,[4] and the sought-after award of §406(b) fees, when coupled with the retained EAJA fee, would constitute an award of the entire amount of the 25% cap; the Court has sought to comply with *Dawson* by adding the following admonition to any "full cap" §406(b) award:

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[4]Some practitioners may seek to obtain the full 25% award *and* retain the EAJA fee by obtaining the EAJA first, then "deducting" the amount of the EAJA award from a §406(b) petition and award (which would leave a balance equal to the EAJA award with the Commissioner), and then seeking that balance under §406(a). *See, generally, infra.*

> provided that counsel is barred from any further request for fees in this matter, pursuant to § 406(a) or otherwise, and counsel for both parties are directed to advise the agency of this preclusion as part of the Court's award.

This provision has been objected to by the Commissioner and the social security practitioners, who, in their collective responses, ask the Court to substitute the following:

> This court approves $XXXX in 406(b) fees in this matter. However, the amount of 406(b) fees authorized combined with the total amount of 406(a) fees already approved and authorized shall not exceed twenty-five percent of the total past-due benefits payable to Plaintiff.

(Docs. 29, 30). This provision would be acceptable *if* all possible §406(a) fees had, indeed, been "already approved and authorized" at the time of filing of the §406(b) petition. There is no showing by any of the parties, however, that such is the case. This is the root of the complex problem presented to the Court.

As explained by Judge Dalton in a similar case:

> Relying on Ninth Circuit precedent, [claimant's attorney] contends that § 406(a) does not impose the same 25–percent fee restriction on the Commissioner that § 406(b) imposes upon courts. (*See id.* at 6 (citing *Clark v. Astrue*, 529 F.3d 1211, 1216 (9th Cir.2008)).) [Claimant's attorney] thus argues that he should be entitled to first seek from courts the maximum 25–percent § 406(b) fee award and then seek from the Commissioner further § 406(a) fees,

resulting in an aggregate § 406 award exceeding 25 percent of his client's past due benefits. (*See id.* at 6–8.) Magistrate Judge Baker's recommendation to the contrary, [counsel] argues, would result in federal courts impermissibly encroaching upon the authority of the Commissioner. (*See id.*)

The Court disagrees. As [counsel] well knows,[fn omitted] the question of whether attorney's fees awarded under §§ 406(a) and (b) can exceed 25 percent in the aggregate has not been "novel" in this Circuit since 1970, when the *Dawson* court held that they cannot. *See* 425 F.2d at 1195. Regardless of [counsel's] Ninth Circuit authority, *Dawson* binds the Court and forecloses it from awarding any § 406(b) fee that will result in an aggregate § 406 award in excess of 25 percent of a claimant's past-due benefits. *See id.*

As Magistrate Judge Baker notes, complying with *Dawson's* aggregation limitation is ordinarily a straightforward arithmetic exercise; Social Security attorneys typically obtain a § 406(a) fee authorization before making their § 406(b) request, and thus courts can subtract the § 406(a) fee from 25 percent of the claimant's past-due benefits to determine the maximum allowable § 406(b) award. (*See* Doc. 28, p. 3.) Here though, by seeking a § 406(b) award prior to seeking a § 406(a) award, [claimant's attorney] has (intentionally) made that calculation impossible.

> The Court cannot permit [counsel] to circumvent the *Dawson* aggregate-fee limit by requesting § 406(b) fees prior to requesting § 406(a) fees. The 25–percent aggregate § 406 cap discussed in *Dawson* is not a technical formality; it is designed, among other things, to prevent attorneys from charging "inordinately large fees for representing claimants in Federal district court." 425 F.2d at 1194. As *Dawson* remains binding, the Court will not shirk its obligation to enforce the 25-percent cap.
>
> Based on [counsel's] representation that he intends to make his §§ 406(a) and (b) requests in reverse order to circumvent the *Dawson* aggregation limit, the Magistrate Judge could reasonably have recommended denying [counsel's] § 406(b) fee request without prejudice to its reassertion after he either obtains a finite § 406(a) authorization from the Commissioner or agrees not to seek one, after which the Court would be able to make a concrete § 406(b) determination. However, the Magistrate Judge evidently elected not to recommend such a needless waste of judicial and administrative resources, and instead recommends authorizing the full § 406(b) award on the condition that [claimant's attorney] be precluded from seeking further § 406(a) fees. (*See* Doc. 28, p. 5.) The Court finds Magistrate Judge Baker's recommended approach to be reasonable and consistent with its obligations under *Dawson*, and thus it will adopt and confirm the R & R.

Bibber v. Comm'r of Soc. Sec., No. 6:12-cv-1337-ORL, 2015 WL 476190, at *2-3 (M.D. Fla. Feb. 5, 2015). Absent knowledge of the amount of §406(a) fees and assurance that the cap has not *and will not* be exceeded by virtue of the §406(b) award, the Court cannot comply with the mandates of *Dawson* and assure that it is not inadvertently assisting counsel in the "double recovery" prohibited by the EAJA.

Nothing presented by the Commissioner or counsel at argument or in the Responses filed (Doc. 29, 30) changes this conclusion. The parties contend that: 1) *Dawson* is not controlling, because that Court "did not hold that the total 406(a) fees and 406(b) fees awarded cannot ever exceed twenty-five percent of the claimant's past-due benefits" (Doc. 30, p. 5); 2) *Paltan* and *Bookman* are unpublished, not binding, and not persuasive; and 3) the Court should follow the unreported district court case of *White v. Comm'r of Soc. Sec.*, 2012 WL 1900562 (M.D. Fla. May 2, 2012) (adopted and confirmed by *White v. Comm'r of Soc. Sec.*, 2012 1890558 (M.D. Fla. May 24, 2012) instead.

— ***Dawson* continues to apply**

The parties' construction of *Dawson* is, at best, odd. At issue in *Dawson* was "allowance of a total fee in excess of twenty-five percent of past due benefits." 425 F. 2d at 1195. Stating "[w]e are fully convinced that 42 U.S.C.A. 406 precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant," 425 F.2d at 1195, the *Dawson* court affirmed the decision of the lower court which "conclud[ed] that 42 U.S.C.A. 406 limits an attorney's total fee allowance to twenty-five percent of the past due benefits recovered by the

claimant regardless of the fact that the attorney represented the claimant before both the Secretary and the District Court." 425 F.2d at 1192. The parties' contention that *Dawson* "did not hold that the total 406(a) fees and 406(b) fees awarded cannot ever exceed twenty-five percent of the claimant's past due benefits" is rejected. As is clear, that is exactly what the *Dawson* court held.

Nor is this Court alone in that observation. As Judge Conway has noted:

> No matter what statute or combination of statutes an attorney uses to obtain fees after a successful Social Security appeal, binding Eleventh Circuit precedent caps the aggregate amount of attorney's fees at 25 percent of the past-due benefits awarded to the claimant. *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970).

Carbonell v. Comm'r of Soc. Sec., No. 6:11-CV-400-ORL-22, 2015 WL 631375, at *1 (M.D. Fla. Feb. 13, 2015).[5] The Eleventh Circuit has relied upon and applied *Dawson* in both published and unpublished opinions. *See, e.g., Paltan*, 518 F. App'x 673; *Bookman*, 490 F. App'x 314; *Green v. Comm'r of Soc. Sec.*, 390 F. App'x 873 (11th Cir. 2010);[6] *Bergen v. Comm'r of Soc.*

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[5]Judge Dalton has also affirmed this interpretation, and *Dawson's* status as controlling and binding precedent. *Bibber, supra.*

[6]Of particular note, contrary to its position in this case, in *Green*, the Commissioner argued "that the district court erred in calculating Green's §406(b) fee by failing to include in its calculus the $5,300.00 already paid to Green's administrative attorney

Sec., 454 F.3d 1273 (11th Cir. 2006); *Shoemaker v. Bowen*, 853 F.2d 858, 861 (11th Cir. 1988). In doing so, the Eleventh Circuit has rejected the contention that *Dawson* – and its prohibition against aggregate fees over 25% of past-due benefits – is anything other than binding precedent. *Paltan*.

— ***Paltan* and *Bookman* are persuasive**

The parties next contend that *Paltan* and *Bookman* are unpersuasive as they are unpublished and, in the case of *Paltan*, "actually conflict" with *Dawson* and *Jackson*.

In *Paltan*, a per curiam opinion, the Eleventh Circuit affirmed the decision of this Court, holding that "[t]he district court did not err in its attorney's fees calculation." 518 F. App'x at 674. The *Paltan* opinion discusses both *Dawson* and *Jackson*, and directly addresses the issues raised in the instant case and related cases:

> George Paltan appeals the district court's [] award of attorney's fees under 42 U.S.C. § 406(b) to Richard Culbertson, his attorney before the district court in a challenge to the Social Security Administration's denial of his application for disability insurance benefits and supplemental security income. On appeal, Paltan argues the district court erred by awarding Culbertson attorney's fees in the amount of $182.91, rather than $4,281.83. He

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under §406(a) . . ." 390 Fed. Appx. 873, n. 1. The Eleventh Circuit did not reach that argument "because the Commissioner failed to file a cross-appeal raising the issue." *Id.*

maintains the district court erroneously concluded that the total amount of attorney's fees recoverable under 42 U.S.C.§ 406(a), § 406(b), and the Equal Access to Justice Act (EAJA), 28 U.S.C.§ 2412(d), could not exceed 25% of Paltan's past-due benefits.

The district court did not err in its attorney's fees calculation.[] Paltan was represented in his proceedings before the Social Security Administration by J. Michael Matthews. After the Commissioner of Social Security denied Paltan's application for benefits, Paltan, represented by Culbertson, successfully appealed to the district court. Following the district court's remand, the Social Security Administration awarded Paltan $38,327.35 in past-due benefits. Accordingly, Matthews and Culbertson could receive, in the aggregate, 25% of those past-due benefits as attorney's fees, or $9,581.83. *See Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir.1970) (holding that 42 U.S.C.§ 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant.").[] Because Matthews received $5,300.00 in attorney's fees pursuant to 42 U.S.C.§ 406(a) for his work before the Social Security Administration, Culbertson was entitled only to $4,281.83 under § 406(b) for his work before the district court--i.e., the remainder of the $9,581.83 of past-due benefits available for attorney's fees. *See Dawson*, 425 F.2d at 1195.

Culbertson, however, previously obtained an attorney's fees award of $4,098.92 under the EAJA for the work he did before the district court. As such, the "Savings Provision" of the EAJA required Culbertson to refund either the EAJA award or the § 406(b) award, whichever was smaller. 28 U.S.C. § 2412, note; Pub. L. No. 99-80, § 3, 99 Stat. 186 (1985); *see also Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1271-72 (11th Cir. 2010). Because the $4,098.92 EAJA award was smaller than the § 406(b) award of $4,281.83, Culbertson was required to refund the EAJA award to Paltan. Culbertson had the option of either refunding the EAJA award to Paltan directly, or reducing his § 406(b) award by $4,098.92, leaving him with a § 406(b) award of $182.91, the figure calculated by the district court.[] *See Jackson*, 601 F.3d at 1274 (explaining that an attorney who receives fees under both the EAJA and § 406(b) "may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) fee request").

In performing this calculus, the district court did not create a new rule limiting attorney's fees awards under § 406(a), § 406(b), and the EAJA to 25% of a claimant's past-due benefits. Instead, the district court followed binding Circuit precedent in imposing a 25% cap on attorney's fees under § 406(a) and (b) in the aggregate. The court, moreover, did not err by refusing to allow Culbertson to offset his EAJA award by deducting it from the total of Paltan's

> past-due benefits, which included the § 406(a) award to Matthews, or by prohibiting Culbertson from receiving double payment under the EAJA and § 406(b) for representing Paltan before the district court. *See id.* at 1272 ("We have previously recognized that the Savings Provision was intended to prevent attorneys from receiving double recovery under both the EAJA and § 406(b)."). Accordingly, we affirm the district court's award of attorney's fees.

Paltan, 518 F. App'x 673, 673-75 (11th Cir. 2013) (emphasis added and footnotes omitted). Against this clear language, the parties' contention that "[t]he affirmation of the district court fee order in *Paltan* does not establish that the Court agreed with the analysis, but only that the amount was within the discretion of the district court" (Doc. 30, p. 9) is without merit. The parties present no reason for disregarding *Paltan* here.

Similarly, in *Bookman*, the Eleventh Circuit affirmed the undersigned's order with respect to attorney's fees under §40(b) and EAJA. The appellate court explained:

> If a party filing for disability benefits receives a favorable determination before the SSA, the Commissioner is required to fix a reasonable fee to compensate her attorney, but that award may not exceed 25% of the claimant's past-due benefits. 42 U.S.C. § 406(a). Similarly, if a party filing for disability benefits receives a favorable judgment from a court, the court may fix a reasonable fee to compensate her attorney, but

> that award also may not exceed 25% of the claimant's past due benefits. *Id.* § 406(b). And the aggregate of the attorney's fees awarded under § 406(a) and § 406(b) may not exceed 25% of the claimant's past due benefits. *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir.1970).[] Awards under § 406 are paid "by the claimant out of the past-due benefits awarded." *Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1271 (11th Cir. 2010).
>
> In this case, the district court did not abuse its discretion because it was not authorized to award additional attorney's fees under § 406(b). The SSA had already awarded 25% of Bookman's past-due benefits to her attorney under § 406(a), and any additional award under § 406(b) would have resulted in an aggregate award that exceeded the maximum allowable under § 406. *See id.*

Bookman v. Comm'r of Soc. Sec., 490 F. App'x 314, 316 (11th Cir. 2012) (footnote omitted).[7] Although not published, the parties point to nothing to dilute *Bookman's* persuasive value, as it is consistent with *Dawson* and its progeny.

— The Court declines to follow *White*

To the extent the parties urge the Court to follow *White v. Comm'r of Soc. Sec.*, 2012 WL 1900562 (M.D.

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[7]Note that *Bookman* looked to the §406(a) award as a basis for concluding that the district court was not authorized to award additional fees under §406(b). Without knowledge of the §406(a) fees already awarded, the Court cannot ascertain the limits of its authority under the statute.

Fla. May 2, 2012) (adopted and confirmed by *White v. Comm'r of Soc. Sec.*, 2012 1890558 (M.D. Fla. May 24, 2012)), this Court has already addressed and distinguished *White* in *Paltan*, and that case has been affirmed. *See Paltan*, Case No. 07-cv-932-DAB (Doc. 37). The parties present no compelling reason to find *White* persuasive here.

Although it is not discussed at length in the Response, the Court assumes the parties are relying on *White* for its finding that, "[i]n determining an appropriate Section 406(b) fee, the Court should not include any fees awarded under the EAJA as part of Section 406(b)'s statutory cap." *White*, 2012 WL 1900562, at *6.[8] As support for this conclusion, Judge Kelly quoted and relied upon *Watford v. Heckler*, 765 F. 2d 1562 (11th Cir. 1985). *Id.* At issue in *Watford*, however, was not, as here, the appropriate calculation of the §406(b) fee, but whether §406(b) limits or prohibits an award of attorney's fees *"against the government"* under the *EAJA*. As explained by that court:

> Therefore, the question becomes this: does Section 406(b) of the Social Security Act directly or indirectly place a ceiling on the *amount* of attorneys' fees that may be awarded against the government (pursuant to the EAJA) in Social Security cases? In view of the purposes and legislative histories of the two acts, as well as their express language, the answer would seem to be no. As already noted, the express language of Section 406(b) makes no reference to any

[8]The parties cite no other case which follows *White* with respect to this conclusion.

> limitation on the amount of fees to be awarded *against the government* in a proper case. Nor can any limit be gleaned from the express purposes of the two acts. The purpose of the EAJA was to alleviate economic deterrents to contesting unreasonable government action by shifting the burden of attorneys' fees from the private litigant to the government where the government's position is substantially unjustified. See H.R.Rep. No. 96-1418, 96th Cong.2d Sess. (1980), reprinted in 1980 U.S.Code Cong. & Ad.News 4984. The purposes of 42 U.S.C. § 406(b), on the other hand, were (1) to limit the size of contingency fees payable by the client, Congress believing that contingent fee arrangements in Social Security cases often resulted in an inordinate deprivation of benefits otherwise payable to the client, and (2) to ensure that attorneys would receive some fees for their representation. See S.Rep. No. 404, Cong., 1st Sess. 422 (1965), reprinted in 1965 U.S.Code Cong. & Ad.News 1943, 2062. *See also Guthrie v. Schweiker*, 718 F.2d at 107, n. 9; *Watkins v. Harris*, 566 F.Supp. at 495-96; *Ocasio v. Schweiker*, 540 F.Supp. at 1322. Consequently, allowing fee awards *against the government* in Social Security cases in amounts greater than 25 percent of a claimant's past-due benefits would not be contrary to the letter or the spirit of 42 U.S.C. § 406(b).

Watford v. Heckler, 765 F.2d 1562, 1566-67 (11th Cir. 1985) (emphasis original). Here, the EAJA award has already been formulated without any reference to the

§406(b) cap. More importantly, that issue has nothing to do with how the courts are to treat EAJA fees *already awarded* in calculating an appropriate §406(b) fee. Indeed, the *Watford* court acknowledged as much, noting: "Of course, no 'double recovery' is permitted, and any award received by the claimant's counsel under the EAJA for work done in court must be used to reimburse the claimant up to any amount previously awarded under 42 U.S.C.§ 406(b)(1) for counsel's services in court." *Id., n. 5.*

The Supreme Court discussed the role of the EAJA in the social security fee context, at length, in *Gisbrecht v. Barnhart*, 535 U.S. 789, 122 S. Ct. 1817, 152 L. Ed. 2d 996 (2002). The Court stated:

> In many cases, as in the instant case, the Equal Access to Justice Act (EAJA), enacted in 1980, effectively increases the portion of past-due benefits the successful Social Security claimant may pocket. 94 Stat. 2329, *as amended*, 28 U.S.C. § 2412. Under EAJA, a party prevailing against the United States in court, including a successful Social Security benefits claimant, may be awarded fees payable by the United States if the Government's position in the litigation was not "substantially justified." § 2412(d)(1)(A). EAJA fees are determined not by a percent of the amount recovered, but by the "time expended" and the attorney's "[hourly] rate," § 2412(d)(1)(B), capped in the mine run of cases at $125 per hour, § 2412(d)(2)(A). ... Cf. 5 U.S.C.§ 504 (authorizing payment of attorney's fees by the Government when a party prevails in a federal agency adjudication).Congress

> harmonized fees payable by the Government under EAJA with fees payable under § 406(b) out of the claimant's past-due Social Security benefits in this manner: Fee awards may be made under both prescriptions, but the claimant's attorney must "refun[d] to the claimant the amount of the smaller fee." Act of Aug. 5, 1985, Pub.L. 99-80, § 3, 99 Stat. 186. "Thus, *an EAJA award offsets an award under Section 406(b)*, so that the [amount of the total past-due benefits the claimant actually receives] will be increased by the ... EAJA award up to the point the claimant receives 100 percent of the past-due benefits." Brief for United States 3.

Gisbrecht, 535 U.S. at 796, 122 S. Ct. at 1822 (emphasis added, footnote omitted). *See also Bergen v. Comm'r of Soc. Sec.*, 454 F.3d 1273, 1277 (11th Cir. 2006), quoting *Gisbrecht*.

Under the dictates of *Jackson*, the claimant is entitled to the full benefit of the EAJA award unless the EAJA award exceeds the §406(b) fee. In cases where the funds withheld by the Commissioner are sufficient to cover the §406(b) fee, counsel has the option of refunding the EAJA award to the claimant or reducing the §406(b) fee by the same amount. 601 F.3d at 1271. In cases where the withheld funds are insufficient to pay the entire approved §406(b) fee, counsel may collect only so much of the withheld funds as leaves the claimant with the full EAJA award -- again, unless the EAJA award exceeds the available §406(b) funds. Thus, regardless of whether it is offset by refund directly to the claimant, or retained by

counsel and deducted from the §406(b) request, the EAJA award cannot be ignored and must be accounted for in the §406(b) calculation.[9]

Stated differently, the methodology approved by the Eleventh Circuit in *Paltan* still applies. Counsel cannot sequence the various sources of payments and credits to avoid the dictates of the statutes and case law. To the extent the parties rely on *White* to conclude otherwise, they are mistaken.

IV. Going Forward

The Court ends the analysis where it began and concludes that the statutory framework and binding case law in this circuit compels the rejection of the parties' suggested language. To the extent the parties object to the language prohibiting counsel from seeking additional §406(a) fees after obtaining full relief from this Court, the Court can deny all applications that do not provide complete information regarding the status of §406(a) fees, as premature. Alternatively, and in view of counsel's difficulties in obtaining accurate and timely §406(a) information from the Commissioner, the Court can award §406(b) fees conditionally, to wit:

> This court approves *up to* $XXXX in 406(b) fees in this matter, provided the maximum amount of 406(b) fees authorized combined with 1) the total amount of 406(a) fees authorized by the Commissioner and 2) the amount of any EAJA award that has not been refunded to the

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[9]This is not to say that the Court must order the refund or oversee payment. *Jackson* makes clear that it is counsel's obligation under penalty of law to effectuate the offset.

> claimant shall not exceed twenty-five percent of the total past-due benefits payable to Plaintiff.

This language adheres to the statutory standard and places the responsibility for compliance with *Dawson* and *Jackson* on the parties and counsel.

The instant motion

The premise of Defendant's motion is its assertion that "the Order appears to direct the Commissioner not to award counsel §406(a) fees, should Plaintiff's counsel seek them," citing page 5 of the Order. The Order does no such thing. Rather, the Order explains the controlling law in this circuit and grants counsel's motion, "**provided that counsel** is barred from any further request for fees in this matter, pursuant to § 406(a) or otherwise, and counsel for both parties are directed to advise the agency of this preclusion as part of the Court's award." (Doc. 26, at 5-emphasis original). The Court did not purport to direct the Commissioner to take - or not take - any action.

Here, **counsel** was seeking a §406(b) fee which, coupled with retention of the EAJA fee already awarded, equaled the full 25%, leaving no additional funds available to award under §406(a), without running afoul of the cap. As the motion for §406(b) fees was filed before any petition for an award of fees under §406(a) was presented to the Commissioner, and the motion was not opposed by the Commissioner as being premature or otherwise, the Court granted the amount sought, which had the legal effect of foreclosing any additional award under §406. To the extent the Commissioner now asserts that "this court is not the correct forum to determine whether the payment of 406(a) fees is appropriate," the Court reiterates that it

has no such plans. Should the Commissioner see it differently, she may object to future §406(b) motions as premature, if they fail to present without either 1) evidence of a §406(a) award or 2) a signed waiver of §406(a) fees by all counsel at the administrative level. Alternatively, the Court can condition its §406(b) award, as set forth above. In any event, the instant motion presents no sufficient ground for relief from the November 17, 2015 Order. It is therefore **denied.**

DONE and **ORDERED** in Orlando, Florida on April 19, 2016.

/s/

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Relevant Statutory Provisions

§ 406. Representation of claimants before Commissioner

(a) Recognition of representatives; fees for representation before Commissioner of Social Security

(1) The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Commissioner of Social Security, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Commissioner of Social Security. Notwithstanding the preceding sentences, the Commissioner, after due notice and opportunity for hearing, (A) may refuse to recognize as a representative, and may disqualify a representative already recognized, any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice or who has been disqualified from participating in or

appearing before any Federal program or agency, and (B) may refuse to recognize, and may disqualify, as a non-attorney representative any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice. A representative who has been disqualified or suspended pursuant to this section from appearing before the Social Security Administration as a result of collecting or receiving a fee in excess of the amount authorized shall be barred from appearing before the Social Security Administration as a representative until full restitution is made to the claimant and, thereafter, may be considered for reinstatement only under such rules as the Commissioner may prescribe. The Commissioner of Social Security may, after due notice and opportunity for hearing, suspend or prohibit from further practice before the Commissioner any such person, agent, or attorney who refuses to comply with the Commissioner's rules and regulations or who violates any provision of this section for which a penalty is prescribed. The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void. Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this subchapter, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant

to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

(2)(A) In the case of a claim of entitlement to past-due benefits under this subchapter, if--

(i) an agreement between the claimant and another person regarding any fee to be recovered by such person to compensate such person for services with respect to the claim is presented in writing to the Commissioner of Social Security prior to the time of the Commissioner's determination regarding the claim,

(ii) the fee specified in the agreement does not exceed the lesser of--

(I) 25 percent of the total amount of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title), or

(II) $4,000, and

(iii) the determination is favorable to the claimant,

then the Commissioner of Social Security shall approve that agreement at the time of the favorable determination, and (subject to paragraph (3)) the fee specified in the agreement shall be the maximum fee. The Commissioner of Social Security may from time to time increase the dollar amount under clause (ii)(II) to the extent that the rate of increase in such amount, as determined over the period since January 1, 1991, does not at any time exceed the rate of increase in primary insurance

amounts under section 415(i) of this title since such date.

* * *

(C) In any case involving--

(i) an agreement described in subparagraph (A) with any person relating to both a claim of entitlement to past-due benefits under this subchapter and a claim of entitlement to past-due benefits under subchapter XVI of this chapter {Supplemental Security Income for the Aged, Blind, and Disabled], and

(ii) a favorable determination made by the Commissioner of Social Security with respect to both such claims,

the Commissioner of Social Security may approve such agreement only if the total fee or fees specified in such agreement does not exceed, in the aggregate, the dollar amount in effect under subparagraph (A)(ii)(II).

(D) In the case of a claim with respect to which the Commissioner of Social Security has approved an agreement pursuant to subparagraph (A), the Commissioner of Social Security shall provide the claimant and the person representing the claimant a written notice of--

(i) the dollar amount of the past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) and the dollar amount of the past-due benefits payable to the claimant,

(ii) the dollar amount of the maximum fee which may be charged or recovered as determined under this paragraph, and

(iii) a description of the procedures for review under paragraph (3).

(3)(A) The Commissioner of Social Security shall provide by regulation for review of the amount which would otherwise be the maximum fee as determined under paragraph (2) if, within 15 days after receipt of the notice provided pursuant to paragraph (2)(D)--

(i) the claimant, or the administrative law judge or other adjudicator who made the favorable determination, submits a written request to the Commissioner of Social Security to reduce the maximum fee, or

(ii) the person representing the claimant submits a written request to the Commissioner of Social Security to increase the maximum fee.

Any such review shall be conducted after providing the claimant, the person representing the claimant, and the adjudicator with reasonable notice of such request and an opportunity to submit written information in favor of or in opposition to such request. The adjudicator may request the Commissioner of Social Security to reduce the maximum fee only on the basis of evidence of the failure of the person representing the claimant to represent adequately the claimant's interest or on the basis of evidence that the fee is clearly excessive for services rendered.

(B)(i) In the case of a request for review under subparagraph (A) by the claimant or by the person representing the claimant, such review shall be

conducted by the administrative law judge who made the favorable determination or, if the Commissioner of Social Security determines that such administrative law judge is unavailable or if the determination was not made by an administrative law judge, such review shall be conducted by another person designated by the Commissioner of Social Security for such purpose.

(ii) In the case of a request by the adjudicator for review under subparagraph (A), the review shall be conducted by the Commissioner of Social Security or by an administrative law judge or other person (other than such adjudicator) who is designated by the Commissioner of Social Security.

(C) Upon completion of the review, the administrative law judge or other person conducting the review shall affirm or modify the amount which would otherwise be the maximum fee. Any such amount so affirmed or modified shall be considered the amount of the maximum fee which may be recovered under paragraph (2). The decision of the administrative law judge or other person conducting the review shall not be subject to further review.

(4) Subject to subsection (d) of this section, if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Commissioner of Social Security shall * * * certify for payment out of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits (as determined

before any applicable reduction under section 1320a-6(a) of this title).

* * *

(b) Fees for representation before court

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may * * * certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

* * *

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.